

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

IN THE
**United States Court of Appeals
for the District of Columbia**

No. 18918

and

No. 19036

ALBERT P. DICKER, et al.

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court
for the District of Columbia

JOINT APPENDIX

United States Court of Appeals
for the District of Columbia Circuit

VOL. I

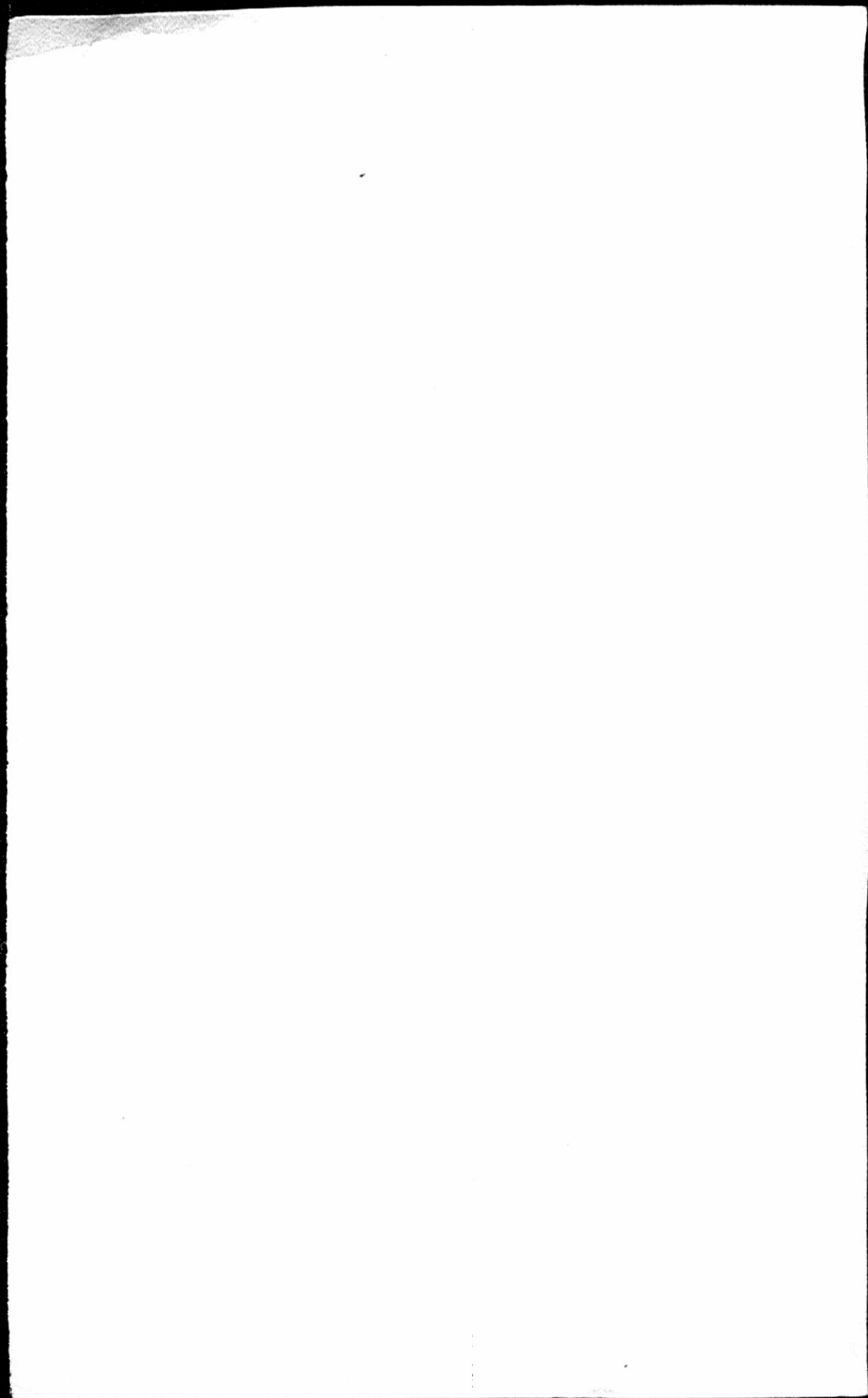
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OWNERS' PRETRIAL STATEMENT

STIPULATIONS REQUESTED:

(5) That formal appraisal reports of the expert appraisers engaged and who may be used at the trial, by the owners and by the United States of America be exchanged within ten (10) days hereof.

MEMORANDUM

In a pre-trial hearing, both parties to this action have raised several important questions concerning the admissibility of evidence proffered to establish the fair market value of the property which is the subject of this condemnation proceeding. This Court will rule on most of these questions in a pre-trial order; however, in addition, this Court is issuing this Memorandum in order to set forth our view of the law pertaining to the novel questions of evidence on several of the matters raised at pre-trial.

Facts

The property involved in this litigation consists of Lots 48, 817, 818, 836, 831, 50, E, F, G, I, L, and K, in Square 378 in the District of Columbia. Lots 48, 817 and 818 have a total frontage of approximately 118.67 square feet on E Street, N. W. Lot 836 is contiguous with Lot 818. Lots E, F, G, H, I, and K, and Lots 831 and 50 front on a 30 foot wide public alley which is to the rear of Lots 48, 817, 818 and 836. There is an eight story warehouse with brick exterior walls located on Lot 48 at 920 E. Street, N. W. A six story brick storage building located on Lots 831, Lots K, I, H, G, F, and D. Lots 817, 818 and 836 were utilized as a parking lot. The entire property is zoned as C-4.

The property was purchased by the defendant owners from the Merchant Storage and Transfer Company in a sale which was recorded on March 12, 1962. On August 8, 1962, the Government entered into a lease agreement for the eight story building, which provided that the owners would renovate said building into first class office space

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by May 16, 1963, and the Government would rent the building for \$388,999.92 per year for five years, with the option to renew for an additional five years.

On November 8, 1962, the defendants entered into an agreement with the Woodmen of the World, whereby the Woodmen of the World agreed to purchase the completed, improved structure for a sum not to exceed two million eight hundred thousand dollars, or the appraised value, whichever was less, and simultaneously lease the same back to the defendants, the defendants to receive the difference between the rent paid by the United States under the lease and the rent required to be paid to the Woodmen, or approximately \$65,000 per year.

On January 2, 1963, the Government published its intention to acquire the subject property for construction of the F.B.I. Building. The Government took title to the property on January 18, 1963.

I

The first point raised in the brief submitted by the Government is that sales contracted after January 2, 1963, should not be admissible.

No proffer of any evidence of sales subsequent to the date of the public announcement was made at pre-trial, and, therefore, no ruling can be made. However, it must be pointed out that normally such evidence is not admissible. In *International Paper Co. v. United States*, 227 F.2d 201 (5th Cir., 1955) in which evidence of sales of other property subsequent to the date of taking was excluded, the court, at page 209, stated:

"... it was not error for him to exclude testimony as to them on the ground that they took place after the condemnation that is here in litigation. Sales cannot be said to be comparable if they are made under such circumstances that they may reflect an increment in value due to the Government's project."

Further, in *Murray v. United States*, 130 F.2d 442, 444, (D. C. Cir. 1942) the court ruled that "... The value of

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the land was to be determined at the time of taking. *Danforth v. U.S.*, 308 U.S. 271, 60 S. Ct. 231, 84 L. Ed. 240. And the duty of the jury was to fix the value without regard to any increase or decrease resulting from the government project."

If any proffer of evidence of sales of similar property subsequent to the announcement of this project is made at the time of trial, the admissibility will be weighed in view of these cases.

II

The Government contends that the lease agreement entered into between the owners and the Government is not admissible to establish fair market value. Counsel asserts that such a lease is not admissible for the reason that leases to a buyer having authority to condemn must necessarily be under the threat of condemnation. Citing, *Slattery Company v. United States*, 231 F.2d 37 (5th Cir. 1956); *United States v. 13,255.53 Acres of Land*, 158 F.2d 874 (3rd Cir. 1946) and others.

Counsel further urges that the special requirements for office space in the District of Columbia enhances the Government's need for property and a lease under these circumstances should not be used in arriving at fair market value. The Government specifically relies on *Carlstrom v. United States*, 275 F.2d 802 (9th Cir. 1960). The Court at pages 808-809 stated:

"The court refused to permit evidence of the rental paid by the government under thirty Convair leases which had been entered into when the Korean War broke out. The court ruled they arose out of government necessity occasioned by war, and did not reflect the true market value. The Court relied on *U.S. v. Cors*, 337 U.S. 325 (1949).

.

"We think the trial court's reliance on this case, and his ruling based thereon, entirely proper."

U.S. v. Cors, supra, concerned a boat requisitioned by the War Shipping Administration during World War II. The Court of Claims had allowed \$15,500 and agreed that the boat was worth \$10,500 and the additional \$5,000 was due to the enhancement brought about by virtue of the need for vessels.

The Supreme Court, in 337 U.S. at 333, held that,

"The special power to the condemner as distinguished from others who may or may not possess the power to condemn has long been excluded as an element from market value. (citing).

"It is not fair that the government be required to pay the enhanced price which its demand alone has created. . . 'It does not reflect what a willing buyer would pay in cash to a willing seller', *U.S. v. Miller*, supra at 374, in a fair market."

In oral argument, the Government further cites *Murray v. U.S.*, 130 F.2d 442 (D. C. Cir. 1942) as authority that the evidence of the lease should not be admitted. However, in that case, the question which was held to be inadmissible pertained to rents which would be charged by the government after the housing project was completed on the land condemned and not rent which was already the subject of a lease agreement between the parties.

Counsel for the owners contend that in this lease, the Government was not under any compulsion to deal with the owners of this particular property. And, at page 94 of the pre-trial transcript, counsel asserts "that the Government did advertise for a bid and that a great number of people bid. . .".

The owners cite *Washington Home for the Incurables, et al. v. Hazen*, 63 App. D. C. 185 (1934) in support of their contention. There the trial court excluded evidence which showed that the commissioners had paid a certain price for adjoining property at a private sale. The court indicated that there is an element of coercion in most of these sales, but reversed the lower court on the basis that there was no element of coercion present in the subject sale.

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Further, in *Hannon, et al. v. United States*, 76 App. D. C. 118 (1942), evidence was offered to prove the price which was paid by the United States following negotiation and purchase for some of the parcels, other than those of appellants. The evidence was excluded by the District Court. In affirming, Judge Miller, writing for the panel, at pages 119-120, stated:

" . . . In the first place, the burden is upon the party who offers such evidence to establish as a preliminary fact that the purchase, concerning which evidence is offered, was made without compulsion, coercion or compromise. In the present case this was not done. . . .

"In the second place, the reception of such evidence, in each case, calls for the exercise of discretion by the trial court. (citing Wigmore on Evidence, 3rd Ed. 1940, sec. 463)."

The Government submitted an affidavit by Mr. John W. Rankin of the General Services Administration. The affidavit, on page 41 of the transcript, states that "a solicitation for space was issued, and an offer was received from Messrs. Albert Dicker and David Lawrence for approximately 100,000 sq. ft. of space . . .".

The above quoted statement and the assertion by counsel for the owners would indicate that the lease agreement was the result of competitive negotiations. However, this determination cannot be made until the proffer is made at trial.

It must also be pointed out that this lease was entered into for a building not yet in existence and which was not completed at the time of taking on January 18, 1963. The issue for the jury is the fair market value as of the date of taking. The lease agreement for the building on the property is question, if admissible under the conditions set forth below, will be received to show the highest and best use of the subject property.

The lease agreement with the United States for the property in question will be admissible, provided that the owners can show that:

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(1) the bids for rental office space were solicited and received on a competitive basis, resulting in the lease between the parties; or,

(2) that the Government paid a fair market rental and not an "enhanced price which its demand alone has created . ." and that the agreed rental was that price that "a willing buyer would pay in cash to a willing seller". *U.S. v. Cors*, supra.

If either of these conditions can be established at trial, the owners will be allowed to introduce the lease agreement between the parties.

III

Counsel for the owners stated that they intend to offer into evidence a commitment from the Woodmen of the World and the acceptance thereof to purchase the completed improved structures, and simultaneously lease the same back to the owners. This commitment was entered into on November 8, 1962, which was prior to the public notice of the project.

The Government cites *Omnia v. United States*, 261 U.S. 502 (1923) in support of their contention that the commitment is not admissible. In that case, the appellant became the owner of a contract to purchase a quantity of steel plate from the Allegheny Steel Company. Before any delivery of the steel was made, the U.S. Government took the entire steel production, thereby frustrating appellant's contract. Appellant claimed that the appropriation was compensable under Article V of the Constitution. The Court, at page 511, noted that "... As a result of this lawful governmental action, the performance of the contract was rendered impossible. It was not appropriated but ended." And further, at page 513, "Frustration and appropriation are essentially different things."

This, of course, is a distinguishable situation which arose due to the exigencies of war. In the present case, we are concerned with the fair market value of a parcel of land, not with the loss of profits from a frustrated contract as

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a result of the action of the Government and for which relief is sought in the Court of Claims.

The Government further cites *Sharp v. United States*, 191 U.S. 341 (1903) for the proposition that additional offers which were received by the owners are not admissible. The court, at page 348, stated:

"... It is at most, a species of indirect evidence of the opinion of the person making such offer as to the value of the land. . . . He may have wanted the land for some particular purpose disconnected from its value. . . . There is no opportunity to cross-examine the person making the offer, to show the various facts. . . ."

The court then went on to explain which offers might be of assistance at page 349:

"... To be of the slightest value as evidence in any court, an offer must, of course, be an honest offer, made by an individual capable of forming a fair and intelligent judgment, really desirous of purchasing, entirely able to do so, and to give the amount of money mentioned in the offer, for otherwise the offer would be but a vain thing. Whether the owner himself, while declining the offer, really believed in the good faith of the party making it, and in his ability and desire to pay the amount offered, if such offer should be accepted, or whether the offer was regarded as a mere idle remark, not intended for acceptance. . . ."

Here, the loss of profits to the owners resulting from the frustration of the sale lease back agreement as a result of the action by the Government would not assist the jury in arriving at the fair market value. However, that is not to say that the price offered by the Woodmen of the World is not admissible.

If the owners can show that the agreement constituted a firm offer without prior knowledge by either party of the proposed project; and that the price was arrived at fairly and without coercion; and, further if the offeror is present and available for cross-examination, the evidence

will be received to show the highest and best use of the property.

IV

The question has been raised as to whether the cost of improving the property as a result of the lease agreement with the Government will be admissible. This question would also appear to depend on the circumstances and the discretion of the Court, with the ultimate objective in mind, that is, will the evidence aid the jury in arriving at the fair market value?

In *Kinter v. United States*, 156 F.2d 5 (3rd Cir. 1946), error was cited in the trial court's admission of the cost of repairs and improvements since its purchase. At page 7, the court stated:

"The owner may, because of his personal knowledge of the property, the uses to which it may be put, the condition of the improvements erected thereon, testify as to its market value. May he also, in the first instance, state as a lump sum the total of all costs incurred by him over a period of years for repairs and improvements as bearing upon the question of fair market value? We think not. Admittedly, cost is not synonymous with market value. A fortiori, cost of land and cost of improvements taken separately and added are not to be equalized with fair market value (citing) . . .

"We conclude the admission of such evidence and its submission to the jury was reversible error."

In *Foster et al. v. United States*, 145 F.2d 873 (8th Cir. 1944), the owner testified as to the price which he had paid in 1932 for the farm being taken. The trial court noted that 1932 was "at the bottom of the depression". The witness then testified that the farm, when he bought it, was in a run-down condition and that he spent a great deal of money on improvements and that, in his opinion, the market value at the time of taking was \$38,000. The court, at page 876, stated:

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"... The testimony showed that conditions had changed in the interval between the sale and the date of taking. This question was asked on cross-examination and the admission of this testimony could not in the circumstances here disclosed have been prejudicial."

This Court is of the opinion that the better rule, in view of the facts in the present case, is to exclude the testimony on the cost of improvements. In fact, it would appear to be rare when the cost of the property plus the cost of improvement would be equivalent to fair market value.

In addition, the parties hereto had entered into a lease agreement. In accordance with the terms of the agreement, the owners had expended a certain amount to renovate the building. The contract was then terminated as a result of this condemnation proceeding. If this action by the Government amounted to a breach of the lease agreement and as a proximate result thereof, the owners lost the amount expended for renovation, an action for the loss will lie on the contract. There would then be a possibility of double recovery for the loss if this amount was admitted as an element of fair market value in this proceeding.

Therefore, the expenses for renovation of the building located on the property in question will be excluded.

/s/ LEONARD P. WALSH, *Judge*

PRETRIAL ORDER

On March 4, 1964, this Court issued a Memorandum setting forth the applicable law on several issues which were raised at pretrial. This Order rules on the remaining issues raised by the parties and incorporates by reference the aforementioned Memorandum.

1. The burden of proof is on the defendant-owners to establish the fair market value of the subject land by a preponderance of the evidence.

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2. The sole issue in this case is just compensation for the property condemned, which is guaranteed by the Fifth Amendment to the Constitution of the United States. Just compensation for the subject property is the fair market value on January 18, 1963, the date of taking.

3. Evidence will be received to show the highest and best use of the subject property.

4. Sales of surrounding property which took place subsequent to the public notice of the project, which is stipulated to be January 2, 1963, will not be admissible. It is presumed that any such sales would reflect an increase in the price of nearby property "resulting from the government project", and are therefore not admissible. *Murray v. United States*, 130 F. 442, 444 (D. C. Cir. 1942).

5. The commitment between the condemnees and the Woodmen of the World, entered into on November 8, 1962, will be admissible to show the highest and best use of the property, provided that the owners can show that the agreement constituted a firm offer without prior knowledge by either party of the proposed project; and that the price was arrived at fairly and without coercion; and that a representative of the offeror is present and available for cross-examination.

6. The lease agreement between the condemnees and the Government, which was entered into on August 8, 1962, will be admissible as evidence of the highest and best use of the property, provided that the owners can show that:

(a) the bids for rental office space were solicited and received on a competitive basis, resulting in the lease between the parties; or,

(b) the Government paid a fair market rental and not an "enhanced price which its demand alone has created . . .", and that the agreed rental was that price that "a willing buyer would pay in cash to a willing seller." *U.S. v. Cors*, 337 U.S. 325, 333 (1949).

7. The condemnees will not be permitted to introduce evidence of the amount actually expended on renovation of

the property as an element of market value. If the lease agreement between the parties is admitted into evidence, the Court will receive evidence of the building to be completed as required by the lease agreement as the highest and best use of the land.

8. Frustration, by this condemnation, of any alleged future plans or contracts, and the anticipated profits therefrom will not be admissible as an element of fair market value.

9. The sale of the subject property to the defendant owners, recorded on March 12, 1962, is admissible as evidence of fair market value. The Court considers this sale which was ten months prior to the time of taking by the Government as sufficiently close to the time of taking to be an indicia of the value.

10. Counsel for the Government and counsel for the owners will exchange names of the appraisers which each expects to call as witnesses. Appraisal reports will not be exchanged and no additional discovery pertaining to these expert witnesses will be allowed.

11. Counsel for the parties are requested to stipulate to the authenticity of documents to be offered insofar as practicable, without waiving any objections to their admissibility on the basis of relevancy, materiality, or competency.

/s/ LEONARD P. WALSH, *Judge*

TRANSCRIPT OF PROCEEDINGS

WILLIAM THROCKMORTON

DIRECT EXAMINATION

(77) Q. Did there come a time when you appraised property known as the former Merchant Storage and Transfer Building property? A. Yes, sir.

Q. Is that also known as 918, 920 E Street, Northwest? A. Yes, sir.

Q. Mr. Throckmorton, would you kindly describe the property for the benefit of the Court and jury? A. May I ask this, Mr. Liotta? How much of a detailed description do you want me to go into?

Q. Describe the property generally, please. (78) A. The address is 920 E Street, Northwest, with a property in the rear which consists of three separate pieces of property. The legal description—do you want that?

Q. No. Just general description of what you found when you saw it. A. The lot dimensions of the front parcel, on the south side of E Street, 118.67 feet to a depth of 187.87 on a thirty foot public alley; a parcel of contiguous land lying between E Street and the rear alley, contains 24,890 square feet.

(Mr. Liotta) Your Honor, with your permission may Mr. Throckmorton approach the Board and point these out.

(The Court) He may.

(Mr. Liotta) Step to the plat over there and take your book with you and give the dimensions of those lots as you found them.

(The Court) Can you all see the board without any trouble—because we can bring it over in front of you if you want?

(Juror No. 1) We can see it.

(The witness went to the blackboard.)

By Mr. Liotta:

Q. Would it be better—if you used Plaintiff Exhibit 1, Mr. Throckmorton? A. This is all right.

(79) Q. All right. A. This is E Street parcel.

(The Court) Mr. Throckmorton, before you begin, if you would switch to the other side, you would not be blocking the view of some jurors. Do you follow me? A. Yes, sir.

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These are known as lots 48, 816, 818, 378, which is a parcel that fronts on E Street.

Am I in your way, Mr. Bernstein?

(Mr. Bernstein) That is all right, Mr. Throckmorton.

(The Witness) The rear parcel, which is the rear alley warehouse, this is also a part of the warehouse—indicating. This is a vacant lot.

By Mr. Liotta:

Q. How many square feet in the vacant lot, do you know? A. Lot 50, fronting thirty feet on the east-west alley, and 77.88 feet—containing 2336 feet of land.

May I skip the decimals?

Q. Yes. Round off your figures yes, sir. A. The frontage on the south side is 118 to a depth of 187 feet. Parcel of contiguous land lying between E Street and the rear alley containing 24,890 square feet.

(80) Q. That is on the total part facing E Street? A. That is the total parcel on E Street.

That is 24,890 feet.

Part of that is improved with the warehouse. Part of it is used as a parking lot.

Detached parcel, seven contiguous lots, 831 and E through K, fronting 99 feet-plus on the east-west alley, and 77 feet plus on 30 foot north side of the alley, containing 7908 square feet of land. The combined area of the three parcels is 35,134 square feet.

Q. Now, Mr. Throckmorton, how wide is the alley, the one facing the southern end of the street, E Street? A. These are both thirty-foot alleys.

Q. Resume the stand please.

Now, would you kindly describe the improvements on the properties? A. The improvements consist of two ware-

house buildings, brick reinforced concrete construction. The larger of the two structures is No. 920 E Street.

The other fronts on an alley, opens to the rear of 920 E Street.

The building on E Street is 8 stories in height, on the street frontage, and due to the slope on the rear of the lot, there is an out of-ground basement, a lower level opening onto a tailgate loading platform on the alley.

(81) The building is in the form of a 'T'. The narrower portion is at the front and widening at the rear. There are windows on the front of the first floor, as this was formerly used as offices.

Q. That is the first floor of the E Street building? A. The first floor of the E Street building.

I might say at this time that all heating and air conditioning equipment for the offices—which supplied the office area when the structure was last occupied by Merchants Transfer and Storage—could be removed at the time of my inspection.

Q. Do you know approximately when Merchants moved out of that building? A. I did have the date on it, Mr. Liotta. I do not remember exactly when. Several months prior to our inspection.

Q. Would you continue. A. Yes.

The floors were surfaced in the office part with linoleum and asphalt tile and the ceilings were covered with Celotex.

In the rear of these offices were two lavatories. The rear portions and upper levels of this building were similar in construction.

The floors were reinforced concrete supported by concrete and steel columns, and steel beams. The walls were solid brick.

(82) The lighting was incandescent drop fixtures and the warehouse areas were unheated.

The concrete stairway served all floors and there also was an electric freight elevator.

Q. How old would you say this building is, approximately, Mr. Throckmorton? A. Well, I happen to know because the vice president of the Prescott Construction Co., which put the building up, built it in 1899.

Q. That is the front building? A. The front building, in 1899.

Q. How about the rear building? A. As near as we could determine, it was built either in the very early twenties or the late tens, 1918 or 1920.

Q. Thank you. A. The dimensions of this building—

Q. You are referring now to which building? A. 920 E.

Q. The front building? A. Yes.

The downstairs—the foundation area, without going into all of the details, measurements, and so on—unless you require them, sir—11,437 square feet.

(83) Q. The foundation area? A. The foundation area, yes, plus the penthouse, 15 by 15, and 295 square feet, and 18 by 41, 738 square feet.

Q. Let me have that again. You referred to a penthouse. What do you mean by a penthouse? A. Well, actually that is the name they gave to it. It is the little building that the elevator machinery and shaft is in. I do not know where they got the name of the 'penthouse' but that is the name they gave it at the District Building.

Q. Continue. A. The front section has an overall height of approximately 96 feet, and the rear section approximately 93 feet—93 and a half feet.

The ceiling clearance on the first floor is about 12 feet, and approximately ten feet on the upper levels.

Q. Ceiling clearance, are you referring to the height, the distance between the floor and the ceiling? A. Yes.

Q. All right. A. Deduct your perimeter walls, including buttresses, 1232 square feet.

Elevator stairway 325 square feet; and you have a net area rounded to 9880 square feet.

(84) 9880 square feet times 8 floors, 79,040 square feet total.

Add to that your lower level of 7220 square feet less your perimeter walls and buttresses, gives you a total rentable area of 85,592 square feet.

Q. That is net rentable area? A. Yes.

Net rentable area. Now, your warehouse on the alley is six stories in height on the alley frontage and has loading doors at grade level on both thirty-foot alley frontages. That is rectangular in shape except for a projection on the south side which is three stories in height and also of brick foundation.

Floors are concrete and the upper levels are carried by reinforced concrete columns with flared capitals.

Exterior walls are brick. The form of window opens up and is bricked up. The lighting and so on is incandescent and no provision for heat of any kind.

Q. How many square feet, approximately, sir, in the rear building?

(The Court) Wait.

Mr. Throckmorton, did you say that there were 79,040 square feet in the upper floors?

(85) (The Witness) 79,040, yes, sir.

(The Court) Then did you say 7200 on the lower level?

(The Witness) Yes, sir, that is the lower level.

(The Court) Then you added the two?

(The Witness) Less the perimeter walls and the buttresses, Your Honor.

(The Court) I see. Because, did you come out with 85,240?

(The Witness) 85,592.

(The Court) 592.

(The Witness) Yes, sir.

(The Court) So that it is not those two figures. It is less.

(The Witness) That is right, yes, sir. I skipped the dimensions of those.

(The Court) I was wondering about my own mathematics.

(The Witness) Yes, sir.

By Mr. Liotta:

Q. Getting back to the back building, how many square feet did you find in that building? A. You want the net, leaving out all the dimensions?

Q. What do you leave out, Mr. Throckmorton; you talked about perimeter walls and buttresses. Is there anything (86) else you left out of your computation? A. The foundation area, the six-story section, less the perimeter walls, elevator and columns.

Q. What is your net area? A. You come out with 42,630 square feet, not counting the three-story section, which brings your total rentable area to 43,050 square feet.

Q. Now, were there any elevators in that building, or in the front building? A. Yes, sir.

Q. Where were they located? A. (No answer)

Q. Let me ask you this: How many elevators were in the rear building or the front building? A. I have to check on my notes, Mr. Liotta.

Q. You check it and I will ask that later.

What was the zoning of this property as of January 18, 1963?

Excuse me. Are you finished with your description of the property? Is there anything else you want to add in the way of description of the property? A. I think so.

Q. While you are looking for the zoning, what was (87) the general condition of the real property—of the property as of the time you saw it? What would you describe it as, or what was its general condition?

Q. The general condition, the construction of the property, leaving out its age, was good, solid construction. It would take an engineer, rather than an appraiser, I think, to determine as to how much weight-load the property would carry. But, apparently, looking at it through your eyes, it was solid substantial construction.

We did have an engineer's opinion on it, and his idea was entirely different from the appraisers. He said they had no value—

(Mr. Yochelson) I move that be stricken.

(The Court) That will be stricken.

By Mr. Liotta:

Q. Confine yourself to your opinion if you would, please, Mr. Throckmorton.

What was the zoning of the property that you found at the date of taking? A. The zoning was C-M Downtown Central Business Commercial.

Q. Is that known as C-4. A. Yes, sir. Wait a minute and I will give that to you, sir.

(88) C-4 Central Business District, and that permits a maximum height of 110 feet with improvements, having any number of stories, or 130 feet if the adjacent street is at least 110 feet wide between building lines. The improvement may contain ten times as much gross floor area as the ground area which it is located on.

No off-street parking or loading berths are required. In the C-4 District Office Buildings, retail stores and other

commercial establishments, not of a manufacturing nature, are permitted.

Q. Was the present improvement as high as allowed by the present zoning, say, the property facing on E Street—was that as high as would be allowed under zoning C-4? A. No, the zoning regulations that were adopted May 12, 1958, cites an excerpt from the Act to regulate the height of buildings approved June 1, 1910 which states that the height of a building may be equal to the width of the street, increased by 20 feet. So, therefore, structures on E Street could be 110 feet in height.

Q. All right, sir.

Mr. Throckmorton, what have you to say about the depth of the property fronting on E Street, if anything? I am referring now to the property depth from E Street running to the alley. What is your opinion as to that depth? Is that (89) advantageous to the property? A. Well, let me make some comment on that, Mr. Liotta.

Regarding the depth of the property, I felt that that tended to reduce the average square foot value.

Q. Why is that, sir? A. Because it is a serious penalty in so far as the rental value of the ground floor is concerned. Higher economic rentals are always received for storerooms having wider window display areas of frontage than for those of narrower frontage and great depth.

Likewise offices facing streets command higher rentals than the exterior space of those fronting alleys.

Now, you have here what you might term a 'T' shaped building, a narrow frontage on E Street, but widening out at the alley.

Q. Your opinion of that is that it is not advantageous, is that right? A. I would definitely say that it is a penalty to the building, whatever structure is on there, whether it is a building or another building, that the depth is a penalty to it. The average downtown building is about 100 feet deep. I think you will find that about average. This runs about 190.

(90) Q. Do you have anything to say about the building in the rear located on the alley? Is that advantageous in your opinion or not advantageous? A. Mr. Liotta, I would consider that building on the alley as a proper improvement for the land.

Q. You felt that was a proper improvement for the land? A. Yes. We went over the whole downtown area, and other than that warehouse on that alley, the only others that we were able to find anywhere were the two Lansburgh Warehouses up on 8th Street and one in the rear of 927 D Street, I believe.

So other than a parking lot, I do not know what else you would do with that alley property.

Q. Let me ask you this: What, in your opinion, was the highest and best use of the front piece of property? A. Well, under today's conditions, I do not consider the warehouse is a proper improvement for the E Street property.

Q. You mean the building, itself? A. Yes. I would think that a loft-type building, or a building with one of the discount houses, or a type structure of that kind would be more suitable to the E Street (91) frontage than the warehouse.

Q. What would you say as to the highest and best use of the lot 50 located on the alley which I am now pointing to on Government Exhibit 1. A. Either as a parking lot or as an accessory to the warehouse that is adjoining it.

Q. Now, was there anything else in the way of description of the property that you care to point out, or have you completed that? A. I would like to say this: Yes, that all of the land area that these three properties occupy is not contiguous. It is divided into three separate parcels, and two of those parcels are only alley frontage, and are the only alley parcels in the subject square with the one exception that the warehouse that the American Security and Storage Company, or the American Security Company had next door.

Q. That is right on this side of Lot E, where I am pointing to on Plaintiff Exhibit 1. A. Yes.

Q. Lot 803 for the record. A. Yes. I have a record of it here in my appraisal, Mr. Liotta.

Q. Did you appraise this property to arrive at its fair market value as of the date of taking in this case? (92) A. Would you repeat that, please.

Q. Did you appraise this property outlined in red on Plaintiff's Exhibit 1, owned by the defendants Dicker and Lawrence to arrive at your opinion of fair market value as of the date of taking in this case? A. Yes.

Q. Mr. Throckmorton, what method or methods did you consider to arrive at your evaluation of the subject property? A. I went into all of the approved methods approaching appraisal value, which included the income approach as the property is now used, or was used as of the date of taking, for warehouse purposes.

Also the reproduction cost, less depreciation of all forms, plus land value, plus comparable sales or the market data approach.

Q. Let me ask you this. Which method of appraisal did you rely on to arrive at your opinion of fair market value? A. Well, in the final analysis, my final conclusions were arrived at from sales data, from comparable sales, both as to land and as near similar type buildings as could be found, principally land value.

Q. Now, sir, in reference to your comparable sales did you examine the public records and did the public records bring in any element of coercion, or compromise? A. No, sir.

(93) Q. There was no element of foreclosure to indicate forced sales? A. No, sir.

Q. Would you give us the sales that you considered comparable to the subject properties?

(Mr. Liotta) Your Honor, while he is giving these sales, may I sit down so I can take these notes?

(The Court) Certainly.

(The Witness) Are you ready?

By Mr. Liotta:

Q. Yes. A. The No. 1 sale, we took the subject property, itself.

Q. That is the subject property, you mean the total property owned by these defendants in this case? A. Yes. That is lots 48, 817, 818, 836, 831, No. 50 and E, F, G, H, I and K, Square 378.

(Mr. Yochelson) I want to object before this witness makes any reference to the purchase price in this particular sale. I think the testimony will show that the property as acquired was not the same as it was of the date it was purchased.

(The Court) Wait just a moment. Are you objecting? (94) (Mr. Yochelson) Yes, sir.

(The Court) Overruled and in cross examination you can bring out any difference.

I do not think Mr. Throckmorton has stated when he made the appraisal.

By Mr. Liotta:

Q. When did you make your appraisal, Mr. Throckmorton? A. The report was completed Feb. 27, 1964.

Q. Were you familiar with this property prior to that date and had you viewed the property on occasion prior to February of 1964? A. Yes.

Q. Were you familiar with the property on or about the date of taking in this case? A. Yes, sir.

Q. Would you kindly get back to the sale of the subject property that you mentioned and give us the names of the seller and buyer and the date of sale? A. May I eliminate the repeating of the description again?

(The Court) Yes.

(The Witness) Total land area of all parcels, 35,134 square feet.

Sold by Merchants Transfer and Storage Company to Dicker & Lawrence, Inc., by a deed dated March 12, 1962 (95) and recorded March 16, 1962, Liber 11768, Folio 255. It indicated the price was \$1 million, which figures to \$28.40 per square foot of land, including improvements.

Q. \$28.40. A. Yes.

Q. Mr. Throckmorton, what weight did you give to that sale in your opinion as an expert real estate appraiser? A. I gave more weight to that particular sale than any others, and I have about 25 or 30 here, if we want to go into that many of them. But I did not consider any other sale in there as near comparable as the property, itself.

I talked with the president of the Merchants Transfer and Storage Company that sold the property. He sold it willingly, he was under no duress to do so. The purchasers so far as I know of were fully informed people. I know of them by reputation very well. They certainly were not forced to buy, and the deal looked like an entirely willing sale from both angles.

The president of the company told me that he was very pleased to receive that price for it.

Q. Now, would you kindly tell us what other sales you considered comparable with the subject property, would you continue, giving the names of the buyer and seller first, (96) and the date of the sale, in order that in the event defense counsel wishes to make an objection before you state your price, the names of the buyer, seller and dates of sale— A. There was a building at 928, 930 F Street, N.W., lot 823, Square 377, improved with an 8-story building that was over 40 years old.

It was sold by George's Radio and Television Company to Allen H. Saturn.

(Mr. Bernstein) Who?

(The Witness) Saturn. By a deed recorded September 25, 1962, Liber 11873, Folio 414.

By Mr. Liotta:

Q. Would you locate that sale, please, with the Court's permission, on that photograph, Government Exhibit No. 2?

A. Would you like to have some of these maps with the numbers marked on them, Mr. Liotta (handing).

Q. Please, if you would, in reference to that sale 928 and 930 F Street, go to the map over there and mark that property. A. Yes.

Q. Now, pointing to Government Exhibit—or Plaintiff's Exhibit 2, would you indicate on there that property. A. Right here.

Q. Did you mark it big enough so everyone can see it.

Now, how many square feet, do you have that in your (97) notes with you there? A. No.

Q. Do you have the price per square foot? A. No.

Q. If you will let me get your book for you.

Now, with that pencil, Mr. Throckmorton, would you put— A. Here this is, if you would like to have this, Mr. Liotta, here is a picture of the building.

Q. Now, would you kindly put your initial 'T' next to the mark which you made and tell us how much that property sold for per square foot and how many square feet were in it. Just put the initial "T" and the amount per square foot.

How much was that per square foot. A. Oh, the price was \$350,000, which figures to \$44.49 per square foot of land including improvements.

Q. Was that improvement as good as, or comparable condition to the subject property, or what kind of condition was that improvement in? A. Well, there was an eight-story building used principally for offices, and was more adaptable to renovating than either of the buildings that we were appraising.

Q. Let me ask you this, sir: The location of the property, was what—what was the comparison with that (98) location and the subject property? A. Well, the F Street location is more superior.

(The Court) The F Street location.

By Mr. Liotta:

Q. Answer that. A. Yes.

Q. While you are standing right there, if you would, tell me what other sales you considered comparable—what was the date of the F Street sale—the one you just had—what was the date of that? A. Wait.

(Mr. Bernstein) September 25, 1962.

(The Court) September 25, 1962.

By Mr. Liotta:

Q. How many square feet in that building? A. 7867.

Q. Was that in the land or building? A. That is the land.

Q. The site had an eight story building on it? A. Yes.

Q. Now, what was the other sale you considered?

(The Court) Are you through with that sale? Are you through with 928 and 930 F Street?

(Mr. Liotta) Are you finished with that sale?

(99) (The Witness) Yes, sir.

(The Court) We will take a break at this time. I understand two of the jurors want to move their cars. When you are ready, let me know.

(Brief recess.)

(The Court) Proceed.

By Mr. Liotta:

Q. You indicated on Plaintiff Exhibit 2, lot 823, and you marked it with your initial. Would you kindly tell me how

much that property sold for per square foot? That was the first property that you gave.

(The Court) That is 928-930 F Street.

By Mr. Liotta:

Q. How much 928 and 930 F Street sold for. A. Forty-four dollars and forty-nine cents per sq. foot. of land which included improvements.

Q. \$44.49 cents? A. Per square foot, including improvements which consisted of an eight story building.

Q. In order to save time, may I mark these, to keep Mr. Throckmorton from running back and forth.

(The Court) Any objection?

(Mr. Yochelson) I do not know what it is.

(The Court) The one he just got through testifying about.

(100) (Mr. Yochelson) No objection to that.

(The Court) All right.

By Mr. Liotta:

Q. \$44.49 now, including improvements. A. Yes.

Q. The next sale you considered and where is it located? A. 918 F Street, which was improved by the six-story building, over forty years old.

Q. Is that known as the Union Building? A. Lot 827, Square 377.

Q. I will mark that with your check mark. A. That was sold by George Wasserman to Georges Radio and Television Co.

Q. What kind of building was that? A. It was an old six-story building, used partly for offices and partly for storage.

Q. When did that sell, sir? A. Oct. 30, 1956.

(Mr. Yochelson) If the Court please, I understood this witness to testify this was a sale from Georges Radio to George Wasserman. I happen to know that Wasserman is the president of the corporation. So this is just a sale from the corporation to its president.

(The Court) Wait just a moment. The Court feels (101) that that is his testimony.

(Mr. Yochelson) All right.

By Mr. Liotta:

Q. When did that sell and how much was it for? A. That is recorded in Liber 10754, folio 257, Oct. 30, 1956.

(Mr. Yochelson) I move this be stricken, this is a 1956 sale.

(The Court) It will be received.

The gentlemen of the jury will understand the year 1956, eight years ago.

By Mr. Liotta:

Q. How much did that sell for? A. \$91,500, which figures—

Q. How much? A. \$91,500. \$21.46 per square foot on land, including improvements.

Q. One other question in regard to F Street property. Did that sell in 1962, that first property you gave, Lot 823, was that in Sept. 1962, 928 to 930 F Street? A. September 25, 1962.

Q. September, 1962. What was the next property you considered comparable with the subject property? Might I ask you this. Excuse me.

(102) This property that you have just testified to which sold in 1956, how did you compare that with the subject property? A. Well, the location is much better than the subject property. The building is more adaptable to completely gutting it and renovating it than the warehouse type property which is the subject property.

Q. Now, what other sale, what was your next sale you considered comparable with the subject property? A. Mr. Liotta, let me say this at this time: These properties are as near comparable. There are none of them, what you might term, really comparable, because there are no warehouses in the downtown area other than the Lansburgh warehouses on 8th street.

What we had to do was to find loft-type buildings that had some near comparability. I would rather use the word 'as near comparable' as anything that we could find.

Q. In other words, you are comparing the shell, is that what you are doing? A. Pardon?

Q. You are comparing the shell of the property; is that what you are doing? A. Yes. I will get to that later on. Because that is all that you can do is to take the buildings and gut them and (103) use the shell.

Q. All right.

Would you go to your next sale? A. Washington Post Company, 1317 and 1321 H Street, Northwest, which is at 13th and New York Avenue and H Street, lot 837, square 250.

Q. Square 250? A. Yes. 13th and New York Avenue and H Street.

Q. That is not on this plat? A. That contained 20,776 square feet of land. That was improved with a six story building and printing plant. It was sold by the Post April 6, 1962 for \$650,000, which figures to \$31.30 per square foot of land including improvements.

(The Court) That is The Herald?

(The Witness) Yes, the old Times-Herald.

(The Court) You call it the Post because they bought it from the Herald.

(The Witness) Yes. This is the last sale.

By Mr. Liotta:

Q. What degree of comparability did that have to the subject property in your opinion? A. Well, I would say it is a better location. The (104) building, itself, would be more adaptable to renovating, which is going on part of it at present. It would be more adaptable to gutting and renovating than the subject property.

Q. Give your next sale. A. 511—11th Street, Northwest, lot 809, Square 347. That was improved with an old seven story loft building.

Q. Lot 809? A. Yes, sir.

Q. All right. A. Sold by the National Republican Publishing Company to Josephine T. Bell, Dec. 6, 1961. Liber 117, 17, Folio 383.

Q. What was the amount of the sale? A. \$68,000. \$28.60 per square foot. Including improvements.

Q. How did you compare that with the subject property? A. The location is better. The building would be better suited to remodeling than the warehouses.

When I say "better suited" it is less expensive. Because a warehouse property is heavily reinforced concrete and steel and that is less expensive and easier to take an office building or an apartment house and gut it clear down to the shell and renovate and remodel it.

(105) Q. How was it as to location? A. I think the 11th Street location is better.

Q. Let me ask you this: Where is your next property that you considered comparable? A. They are the only buildings that I found comparable anywhere in size in a downtown location that you could consider with the subject property.

In the warehouse sales, there were none in the downtown section. I have five here that run, one of them is at 1400 T Street, N.W. That is not on that map.

Q. Did you compare that with the subject property? A. These are all warehouses. Lots 201 and 810 in Square 206,

improved with 3-story building—3-story warehouse containing approximately 30,540 square feet of gross building area, with an adjoining unimproved lot containing 1516 square feet of land.

That was sold in Nov. 1959 by Robert S. Nash to Adams Birch for \$160,000, which figures to \$5.23 per square foot of gross building area.

1707 Kalorama Road N.W.—

(Mr. Yochelson) The Court please, I submit these sales on Kalorama Road and T Street do not help us and I object to it.

(106) (Mr. Liotta) I respectfully submit the witness is testifying on warehouse sales that he found in the District of Columbia, and of course, he had to widen his scope in order to find these sales.

(The Court) Well, the question for the Court, though, Mr. Liotta, is the location.

(Mr. Liotta) Yes, sir. The fact is with this type of warehouse sale, it was necessary, Mr. Throckmorton found it necessary apparently to widen his scope which is not unusual, I submit, in order to find these sales that would be, in his opinion, comparable as far as warehouses were concerned to the subject property.

(The Court) The objection is overruled. The witness may testify.

The jury will understand that they are a great distance from the property in question.

(The Witness) The Kalorama Road Building, 24,808 square feet of land, improved with a two story warehouse containing approximately 35,312 square feet of gross floor area, heated.

(Mr. Yochelson) Is this similarly zoned. I submit if it is not, then it is not comparable.

(The Court) Do you know the zoning?

(107) (The Witness) I do not have it with me. No. All these properties are zoned industrial or commercial, and they have to be to be able to use them for that purpose.

(The Court) The witness may testify.

(The Witness) Sold by Kalorama Road, Inc., to the National Geographic Society in April of 1959, for \$200,000, which figures to \$5.66 per square foot of gross floor area.

(Mr. Yochelson) Your Honor please, I am not sure what the witness means by 'gross floor area.'

By Mr. Liotta:

Q. What do you mean when you say so much per gross floor area? What do you mean in that sense of the word?

A. The area that the building occupies on one floor.

Now, if you multiply that by two stories, or three or four or five or six, whatever you may have, you get your total area for the building. That is how you figure you have so much floor space, so much per square foot floor area.

(Mr. Yochelson) My confusion is that in one case the witness testified as to so much per square foot, with improvements. Now he is testifying on some other basis. I am not sure just what it is and I am sure the jury is not.

(108) (Mr. Liotta) Your Honor, the witness, in his opinion as an expert, is taking these warehouse properties and realizing the warehouse situation, is utilizing a comparison by way of square foot per gross floor area which is usable in a warehouse.

In the other instance that Mr. Yochelson—

(The Court) Let the witness testify to that then.

By Mr. Liotta:

Q. Would you kindly explain how you make the comparison between those warehouses that you are now testifying to, and the subject warehouse in this case. A. Well, one has nothing to do with the other in any sense of the word. Your land sales are entirely separate from what your value per square foot of floor area is.

Q. I am asking, how did you compare these warehouses that you just testified to? That is to the subject property. How did you compare it as an expert witness, and how did you then utilize your— A. I used the prices that these buildings sold for and the number of square feet that they occupied. That is how you get your valuation of your floor area, so much per square foot. That gives you an indication of what the subject building would be worth, based on a rental value.

(109) Q. Are you comparing then the gross floor area of rentable area with the subject property—is that what you are doing? A. Yes, to arrive at what would be a fair value per square foot of rental area in the subject property.

Q. Now, what other sales did you consider?

(The Court) Wait just a moment. He has not given the price yet, has he?

(The Witness) That is the Kalorama Road. \$200,000.

(The Court) At how much?

(The Witness) \$5.67 per square foot of floor space area.

(The Court) All right.

Now, Mr. Throckmorton, the objection is made on the basis, on 928 and 930 F Street and 11th Street property, and the other properties. As the Court understands, you testified as to your total value and then per square foot with the improvements.

(The Witness) Yes.

(The Court) Now, what was the total square footage of this property at Kalorama Road?

(The Witness) 35,312 square feet.

(The Court) 35,312 square feet?

(110) (The Witness) Yes, sir.

(The Court) Now the improvements covered how much of that? Do you know?

(The Witness) 24,808 square feet of land.

(The Court) How much?

(The Witness) 24,808 square feet, improved with a two-story warehouse.

(The Court) All right.

(The Witness) That building evidently had some offsets in there because there was 35,312 square feet of floor area. So, a two story building would have been 48,000 if they carried it all the way up.

(Mr. Yochelson) Your Honor, I do not want to belabor the point. But it seems to me, if we are going to offer a sale as comparable, then the same yardstick ought to be employed in both cases.

(The Court) Mr. Yochelson, you can bring it out on cross.

(Mr. Yochelson) Very well.

By Mr. Liotta:

Q. Mr. Throckmorton, what was your next sale that you considered? A. 1501 and 1505 14th Street, Northwest, Lot 830, Square 241.

Q. Was that improved? (111) A. That was improved with a three-story distribution building, having a gross floor area of approximately 23,625 square feet, heated.

It was sold by Wasserman Properties, Inc., to Edmund W. Dreyfuss, April 30, 1962, for \$185,000. The sale price figures to \$6.35 per square foot of gross floor area.

1522, 1524—14th Street, N.W. Lots 84, square 209. A three story sales and service building containing approximately 21,600 square feet of gross floor area—heated.

Sold by C. D. Drayton, National Savings and Trust Company to David A. Cohen, Dec. 31, 1958, for \$135,000. Sales price figures to \$6.25 per square foot of gross floor area.

Q. Proceed. A. 1510, 1520—14th Street, N.W., lots 57,

58, 59 and 838, square 209, a three story distribution type building, approximately 27,000 square feet floor area, heated, sold by Kogod, Grosberg & Berger to Pan American Union, June 15, 1960. \$150,000, this figures to \$5.57 per square foot.

Now, they are as near anything in a warehouse line more than one story in height that could be located. There are any number of warehouses on Queens Chapel Road and Bladensburg Road, but they have all gone into the one-story (112) buildings.

So, it was necessary to try and find something that was somewhere near similar in the warehouse line.

Q. What, of those sales were you making comparison with gross floor area—the last four or five sales—what did they indicate to you so far as the subject property is concerned?
A. I will have to get to that later on.

Q. Let me ask you this: Were those sales that you gave in referring to gross floor area building, were they for purposes of your income approach? A. Maybe this will clarify the situation.

(Mr. Yochelson) I submit he ought to answer the question.

(The Witness) I would like to answer that if I may.

(The Court) Proceed.

(The Witness) It is a further analysis of the value of subject improvements, and they are all two, three and four stories in height and are more desirable for warehouse lump purposes than six and eight story buildings. They indicate these buildings sold at \$5.23 to \$6.25 per square foot of gross floor area, and would, therefore, set the upper limit of value. I would estimate the value of subject improvements, including the land which they occupy at the rate of \$5.00 per square foot gross floor area. Now, (113) that was the purpose of using these other sales. To try and arrive at a fair valuation of what this building should rent for.

By Mr. Liotta:

Q. Tell us, were there any other sales that you considered comparable to the subject property? A. I would like to go into my land sales.

Q. All right. A. 513—9th Street.

Q. 513—9th? A. Yes. Lot 800, Square 406. 11,480 square feet.

Q. Excuse me. Wait a moment.

That was lot 800? A. Lot 800, square 406.

Q. Was that formerly a theater? A. That is the Washington Theater, Inc. It sold by them to Ruth Angelo July 15, 1959, \$147,500. \$12.84 per square foot. That is per square foot of land, your Honor.

Q. \$12.84 per square foot? A. Yes—Now that is land only. That does not include any improvements.

Q. All right. A. 517—9th Street—

(Mr. Yochelson) I submit it would be helpful to everyone (114) if we could know how this was zoned so that we might properly compare it.

By Mr. Liotta:

Q. What was the zoning? A. Well, these properties are all zoned commercial.

Q. Commercial?

(Mr. Yochelson) We know there are more than one kind of commercial. We think he ought to tell us what the zoning is.

(The Witness) I will be glad to bring you a detailed description of each one of them. So far as I know now they are all C-M-4s that I am using here.

By Mr. Liotta:

Q. C-M-4's. A. Yes. If I have made a mistake in any of them, I will be the first one to tell you.

Q. C-M-4 or R-4. C-4 excuse me. Is that what you mean? A. Yes. C-4.

Q. That is the same as subject property. A. Yes, sir.

Q. Now, this property you say that you gave here, 1959, \$12.84—zoned C-4, is that correct? (115) A. Yes.

Q. Will you continue? A. All right.

517—9th Street, lot 803, Square 406. Sold by James E. Duke and Katherine Loughren.

Q. The year? A. To Ruth Angelo, Nov. 19, 1959. \$100,000, \$23.71 per square foot.

Q. Proceed. A. Now, the above parcels were cleared of an old theater and restaurant building at a cost of approximately \$22,000 and transferred to Lansburgh Realty Corporation Dec. 23, 1960.

The two parcels totaled 15,697 square feet of land and in addition an alley which was numbered lot 812 consisting of 501 square feet was closed, making a total land area of 16,198 square feet. Total cost, including demolition, figures to \$269,500, or \$16.63 per square foot.

Q. That was lot 800 and lot 803 and the other property that you described, or that was it? A. Lot 800 and lot 803 and lot 812.

Q. When was that resold? A. Transferred to Lansburgh Realty Corporation—

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(117) By Mr. Liotta:

Q. Mr. Throckmorton, if you would, sir, the last sale of these two properties, what was the amount per square foot? A. Including demolition of the buildings on there, \$16.63 per square foot.

Q. The year of that sale? A. It was assembled, the first sale was July 15, 1959; Nov. 19, 1959, and December 23, 1960.

Q. December 23, 1960? A. Yes, sir.

Q. That was a sale for \$16.63 a square foot? A. Yes. When it was transferred to Lansburghs.

Q. Now, what was your next sale? A. 701 to 725—9th Street, N.W., immediately adjacent to the Security Bank at 9th and G.

Q. 9th and G? A. Yes.

That runs through to 8th Street, the figure 8. Lots 830, 832, 805, 807, and 828, in square 405.

Q. Give me that again. A. 830, 832, 805, 807, 828. There is 141 foot frontage plus on 9th Street, and 199 feet-plus on G Street.

(118) Q. What was the total square footage? A. The total area of the parcel was 30,613 square feet.

Sold by Service Parking Corporation to Jack Geller, Norman Harro and Himelfarb, dated Sept. 28, 1962, and executed Dec. 31, 1962. Liber 11974, Folio 555. \$625,000. Well, actually \$625,073.43. How all the odd figures came out to that, I do not know. But \$20.41 per square foot is what the thing figures out to.

Q. Now, I must confess I am having a little difficulty putting that particular assembly on the board. Would you mind with the Court's permission may he outline that particular assembly?

(The Court) Yes.

(The Witness) You see 9th and G—

(Mr. Liotta) Talk loud.

(The Court) Keep your voice up so we can hear you.

(The Witness) Lots 830, 832, which begin here and go all the way back.

By Mr. Liotta:

Q. You are pointing from 9th Street to 8th Street? A. This is lot 832. That runs all the way from 9th Street, clear through.

(119) Q. What other lots? A. You have 805, which is this one; 807 and 828. I cannot find that, myself.

Q. Outline what you know are the boundaries. A. Well, it takes in what you have here—indicating. It comes all the way through to here. It does not take in 818. It takes in all of 832.

Q. Am I marking this now along the border of 818? A. Yes.

Q. It includes lot 830? A. Takes in 832.

Q. Includes lot 832. A. Yes.

Q. Is that it? A. Now, you have got it.

Q. And down here, sir, and down here (indicating). A. Yes.

Q. Does it jog down here, too. A. It does in 830. It comes down here.

Q. Will you resume the stand, please.

That had a total of how many square feet? A. 30,613 square feet.

Q. Continue. A. 704 and 708—9th Street, lot 32, square 375. It is the west side of 9th, Mr. Liotta.

(120) Q. 375, lot 32. A. Lot 32, yes.

Q. Proceed. A. Sold November 21, 1962, by Benjamin W. Guy to Dorothy Matthews, to L. B. Doggett.

Q. All right.

How many square feet in that property? A. 2508. This is part of an assembly. \$50,000, at \$20 per square foot.

Lot 813, square 375, 12,850 square feet. Richard P. Cope, to Dorothy Matthews to L. B. Doggett, November 30, 1962, \$300,000, \$23.34 per square foot.

Q. 23-what? A. \$23.34 per square foot.

Q. When was that sale and what year? A. There were

two. November 21, 1962 was one of them. The other one on November 30, 1962. That assembly adjoins—

(The Court) Wait a moment.

The Court understood you to say that 704 and 706 9th Street on the west side, and was sold November, 1962, and it represented \$20 per square foot for 2508 feet.

(The Witness) Yes, sir.

(The Court) Then you said that Square such-and-such—

(121) Is that a new address?

(The Witness) Lot 813, Square 375 was vacant. I did not have an address.

(The Court) What would it be in comparison to 704 and 706—9th Street.

(The Witness) Immediately adjoining it.

(The Court) All right.

(The Witness) It was part of an assembly, Your Honor.

(The Court) And that is a different piece of property than 704 and 706.

(The Witness) Yes, sir.

(The Court) All right.

(The Witness) Now, that assembly adjoins land already owned by Mr. Doggett and used for parking. The total purchase price of the 15,358 square feet is \$350,000, plus an estimated \$6,000 to remove the improvements. Or \$356,000, which figures to \$23.18 per square foot figure.

By Mr. Liotta:

Q. Now, let me ask you this. In other words, you are referring to the assembled price of lot 813 and 832 in square 375. A. Yes, sir.

Q. Now, if I may, sir, I have written on here, "\$23.18 assembly." (122) Is that right? A. That is for the assembly after the improvements, sir, were razed.

(The Court) Putting it another way, it is the average.

(The Witness) Yes, sir, that was the average of the entire parcel.

By Mr. Liotta:

Q. Continue. A. 407 and 409—10th Street, lot 54 and lot 808 square 378.

Q. That is the subject square—that is the square where the subject property is in, is it—did you say square 378? A. Yes. That is the same square.

Q. All right. Continue. Who were the parties? A. Sold April 30, 1962 by George C. Douglas, and Basil C. Douglas to Sylvan Herman and Charles Steinman and Samuel Blanken.

Q. How many square feet in that property? A. 5,343 square feet.

Q. What was the sales price of that? A. The improvements were removed at a cost of (123) approximately \$4800 and the land turned into a parking lot. It indicated the cost of the cleared land was \$194,800, which figured to \$36.45 per square foot.

Q. How did that compare with the subject property in your opinion, and location? A. It is certainly comparable. I would say it would be slightly better.

Q. The next sale. A. 512—11th Street, N.W., Lot 19, square 321, sold September 27, 1961, American Security and Trust Co. to William H. Dyer. \$140,000, \$36.84 per square foot.

Q. \$36-what? A. \$36.84 per square foot.

Q. When was that sold? A. I am sorry, I did not hear you.

Q. What year was that sold? A. September 27, 1961.

Q. How did that compare with the subject property? A. Better, better location.

Q. Next? A. 1110 F, N.W.—lot 819, Square 321. That is an L-Shaped parcel that runs from F back and then through to 12th Street, where the old Columbia Theater was.

Q. What were the numbers again? (124) A. 1110—F, lot 819, Square 321. Sold by the Columbia Palace Corporation to Safeway Stores, Inc., September 13, 1961. \$400,000 or \$54.72 per square foot.

Q. Could you locate that for me on the board—I am having difficulty. A. It is 1110 F Street, Mr. Liotta.

Q. Did you say that was the Columbia Theater? A. The old Columbia Theater? Yes.

Q. Did you say it goes through 12th? A. It is L-Shaped. It comes down—

Q. Mark it on here. A. (Witness complies) You see the old Columbia Theater was here.

Q. Talk louder. A. The old Columbia Theater comes down in here like this.

Q. All right.

(The Court) Have you finished with 1110—F, with Columbia Theater?

(Mr. Liotta) May I just ask again the square footage price on that—how many square feet?

(The Witness) This part of it had 7309 square feet. That is the lot facing on F Street, which property brought \$54.72 per square foot. Now, the other part that faced on 12th Street, part of lot 820, Square 32,

(125) which added an additional 8343 square feet, which was part of a sale two months later, Dec. 31, 1962, which figures to \$50 per square foot.

Q. So what was the total average price, if that is what you are getting to? A. I did not average the two of them. They were separate parcels. One was \$54.72 on F Street and \$50 on 12th Street.

Q. Now, the one on F Street was Dec. 1962, or the one on 12th Street? A. One on F was September 13, 1961, and the one on 12th was Dec. 31, 1962.

Q. How did you compare those two sales with the subject property? A. Your F Street location in the 1100 block is far superior to the location of the subject property, both the 12th Street and F Street, but it was a downtown sale, and in examining these sales, I took all of them that came long. I did not leave that out because it was a high-priced sale, and in arriving at my final valuation on the E Street property I took into consideration the difference in the location of the two properties.

Q. You adjusted for the differences in location, is (126) that right? A. Definitely.

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(131) By Mr. Liotta:

Q. If I may, sir, before you continue your sales—I neglected to ask you yesterday: Is the majority of your appraisal work for the United States or the Federal Government, or what is your experience with appraising? Do you appraise for property owners, also? A. Well, I would say roughly that my appraisal work is 75 per cent, approximately that, conventional, for property owners.

Q. Conventional? A. Yes, and for lending institutions, for banks, insurance companies, and that is an estimate, but I would assume it would be easily three times as much for property owners as it would be for the government.

(132) Q. May I ask you one further question, sir: Would you give us an example of the types of commercial buildings you have appraised here in the City of Washington? A. Well, office buildings, I appraised the Masonic Building in the 1700 block of H Street; also the Barr Building at 17th and Connecticut Avenue; the Red Skins Building; the office building up here on Indiana Avenue built by Pollin; and a number of others; the Lansburg Warehouses up on 8th Street; the West Store Building at 14th and F.

Q. All right, sir.

Now, just one further question. How long have you been appraising property in Washington, approximately? A. Well, as I stated yesterday, I have been in the general real estate business for 42 years. I would say the last thirty years I have specialized in appraisal work.

Q. Now, if you would, Mr. Throckmorton, would you kindly turn your attention to the next sale which you consider comparable. I think that you left off, as his Honor has stated, on the Columbia Palace property, 512—13th Street; is that where we left off yesterday? A. I think we had finished with that one.

Q. Now did you indicate yesterday how you compared 512—13th Street with the subject property? A. Well, if I did not, I can very easily. The location (133) in the 1100 block of F Street, and the other part of the property runs through to 12th Street, is far superior to the subject property here. I took a record of that sale because it was a downtown sale. But to make the comparison between the locations, it is far superior to the 900 block of F Street.

Q. Now, would you kindly turn your attention to the next sale which you considered comparable to the subject property? A. That property is located on the northwest corner of 9th and E Streets, numbered 901 and 903 E Street, and 504—9th Street; lots 801, 845 and 840 in Square 377.

These properties were assembled in two transactions: Lots 801 and 845 being 901 and 903 E Street and they were sold by Jerome B. Mills to Louis Zions, 7299 square feet, on May 23, 1960. The price of \$150,000, which figures to \$20.55 per square foot, including the improvements.

Q. What did you consider this, sir, a land sale basically; is that right? A. Well, it is primarily land, although the improvements are still in use.

Q. When was that sale made? A. May 23, 1960.

Q. Where is that in relation to the subject property? A. Lot 804 which is 504—9th Street.

(134) Q. Excuse me.

Are you going to your next sale now? You said lot 804?
A. Well, this is part of an assembly, Mr. Liotta. Lot 840 was bought later, and added to the first two lots. This lot 840 is 504—9th Street, which the sale was recorded September 21, 1961, from Sadak and wife to Lujac, Incorporated, priced \$60,000 which figured to \$31.18 per square foot.

Q. What lot was that again? A. 504—9th Street, lot 840. Square 377, this is all on the corner, the northwest corner of 9th and E.

The total land area assembled was 9223 square feet. Total purchase price \$210,000 or an average of \$22.76 per square foot, including improvements, which consisted of three old buildings occupied as stores and a restaurant.

Q. Now, may I, Mr. Throckmorton, insert here—you are talking about the total assemblage of Lot 804 and 841 and 805, is that right? A. That is correct.

Q. Your average price was how much? A. The average price was \$22.76 per square foot, including the improvements.

(135) Q. When was that assemblage completed—what was the last date? A. September 21, 1961.

Q. Where is that property in location to the subject property? A. About a block and a half.

Q. Is this it here that I am pointing to on the corner of 9th and E? I want to be sure I have it right. A. It is the northwest corner of 9th and E. It is less than—it is a little over a block from the subject property.

(Witness went to the blackboard.)

Q. Am I on the right street here—is that the property (indicating)? A. This is the property.

(The Court) Keep your voice up now.

By Mr. Liotta:

Q. I asked, is that the property, and the witness pointed out the property and the subject property.

You may resume the stand.

(Witness returned to the witness stand.)

Q. What was your next sale, Mr. Throckmorton? A. There was a sale in the northwest corner of 12th and E, known as 1201 E Street, lot 843 in Square 290.

Q. Lot 843 in square 290. (136) A. Yes, sir.

Q. It is not on this map. Go ahead. A. That was formerly six lots. That was sold by Christian Heurich, to Charles E. Smith and to Antonelli, Jr. The date of that sale was January 23, 1962. The stamps indicated a price of \$1,200,000 which comes to about \$75 per square foot in figures.

Q. Now that property, sir, was on the corner of 12th and E, directly across from the Perpetual Building Association.

Q. How did you compare that property in reference to the subject property? A. Well, there is not any comparison, as to location and size. It is a compact corner on which an office building was constructed. But it was a downtown sale. It was the highest-priced sale so far as I know of in any downtown property when you get down below the financial district, around 15th and K, in that neighborhood.

Q. Well, do you consider this sale better than the subject property, equal to it, or what? A. I consider the 12th and E Street corner far superior to the subject property, actually. There is not any comparison. As I say, it is a small compact corner, 16,000 square feet, as against an inside property in the 900 block of E Street. But it was a downtown sale, and I looked it up and made (137) a record of it with the other sales.

Q. Now, would you give us the next sale which you considered comparable, if you would, please—your sales you considered comparable to the subject property. A. Well,

we come to the southwest corner of 10th and E. That is another corner known as 1,000, 1006 E Street.

Q. What lots does that include? A. That had lots 13, 14, 15, 851, 861, in Square 348, containing 17,714 square feet.

Q. 17,000-how many? A. 17,714 square feet. That was sold by the Evening Star Newspaper Company, Inc., to Dorothy M. Matthews, straw, for Evelyn S. Lamb, one half interest to Evelyn Lamb, and one half interest to Ned Board.

Q. When did that sell? A. That sold for \$850,000 which figures to \$47.98 per square foot of land, including improvements, which consist of a three-story parking garage with a large storeroom which was last occupied by the Sports Plaza.

Q. How did you compare that with the subject property? When was that sale? Excuse me. What was the date of that sale? A. What I was going to say, that after you come down from 12th and E is your best indication of how your square foot values drop. 12th and E, which is the highest-(138) priced downtown at \$75 and now you come to within a half-block of the subject property at the Southwest corner of 10th and E. And your sale figures to \$47.98 a square foot, including the three-story parking garage.

So that is the best indication that when you get out of that neighborhood, there is not any comparison around 12th and E and F, with the subject property.

Q. What was the date of this sale, Mr. Throckmorton? A. November 5, 1958.

Q. All right, sir. What was the next sale you considered comparable? A. Now, we have 406 and 410—7th Street, lots 816, Square 431. 6912 square feet.

Q. Who were the parties on that sale? A. Sold by F. W. Woolworth Company, a corporation, to the U.S. Theater Corporation. Price \$190,000 which figured to \$27.49 per square foot, including improvements, which consisted of a good three story store building with offices above.

Q. What was the date of that sale? A. September 4, 1958.

Q. Proceed. A. Now, we have 605 and 607—7th Street, which is a corner property at 7th and F Streets, directly across the (139) street from Hecht's. Lots 39 and 816, Square 455, that was sold by the National Savings and Trust Company to Charles R. Russell, November 20, 1962, \$150,000 here, which figures to \$34.77 per square foot, including improvements.

Q. How did you compare that with the subject property? A. Well, locations—the location is much superior.

Q. How many square feet were in that total? A. 4471 square feet. It was improved with an old four and five-story building—there were two buildings on there—formerly occupied by Eiseman's Department Store.

Q. Again did you consider this basically a land sale for your appraisal purposes? A. I would consider it a land sale, yes.

Q. What was the next one, sir, or is that it? A. I have got about twenty more over on 7th Street, Mr. Liotta. Do you think it is necessary to go into them? They range from \$16 to \$25 per square foot.

Q. Let me ask you this: Were those sales that you have other than what you have testified to there, are they now, in your opinion, comparable in some degree to the subject property? The ones that you have in your book? A. There is comparability to them as far as land value is concerned. Most of them have improvements on them, (140) some of them have good improvements.

Q. Now, sir, after you had analyzed these sales and the sales that you have testified to, what did that indicate to you in so far as value of the subject property, and how did you consider these sales in arriving at your value of the subject property? A. Well, I considered the selling price of all the sales that I had named here. I tried to make a reasonable adjustment for the date of time between when they took place and the date of taking in this

appraisal of the subject property, and I certainly got a reasonably fair comparison of land sales in that vicinity.

Q. Let me ask you this, sir: After comparing these sales with the subject property, what date did you give to the sale of the subject property, itself, may I ask? A. Well, as I said yesterday, the sale of the subject property, itself, would take precedence in my mind over everything else, because that is it.

Q. How much was that sale per square foot of the subject property, Mr. Throckmorton? A. I don't know as I figured that out, Mr. Liotta. I arrived at a total valuation.

Q. Would you figure it out, please? What was the (141) total price, if you have it? What was the total price? A. The total price was \$1 million.

Q. And it sold when? What was the date of the sale of the property? A. I am looking that up, Mr. Liotta. What was it you wanted?

Q. The date of that sale. A. Sold by Merchants Transfer and Storage Company to Dicker & Lawrence, Inc., by a deed dated March 12, 1962, and recorded March 16, 1962, at an indicated price of \$1 million which figured to \$28.46 per square foot of land, average, which included improvements.

Q. \$28.46 including improvements? A. Including improvements, yes.

Q. In your analysis of sales of the subject and comparable properties as you testified to, what did that indicate to you in your opinion as to the fair market value of the subject property as of January 18, 1963? What did that indicate to you? A. My final valuation on the property was \$1,140,000. I have not finished yet by any means as to—

Q. I understand that.

Mr. Throckmorton, you had stated on your direct examination that you also considered the income (142) approach as to the improvements as they existed on the date of taking; is that right? A. Yes.

Q. Kindly tell us how you considered the capitalization of income approach or method, and would you likewise kindly explain to the jury first, as to what that method entails. A. Yes, sir; I will.

I investigated a number of warehouse rentals in various sections of the city. If you wish me to, I can enumerate them, Mr. Liotta.

Q. All right. Would you first tell us just what the capitalization method of appraising involves for the benefit of the Court and jury, please, and myself. A. Well, that is your income less your expenses. You capitalize what you consider a fair rate of return on the annual net income, which gives you a valuation from your income approach.

Q. Sir, would you kindly start explaining your income approach to us? A. Well, what I did in these warehouses that I located the rentals on, they ran from one-story buildings up to four and five-story buildings, and I found that as your height increased, your rate per square foot of rental value decreased.

In other words, a single story warehouse building would rent from \$1.00 to \$1.25 per square foot.

(143) When you get into the three and four story buildings—some drop down as low as 45 to 50 cents. There is a range anywhere from 45 cents to \$1.25 per square foot, depending on location and the height of the building and so forth.

I can give them all to you. I mean, the addresses and what each one rents for, if you think it necessary.

Q. Why don't you continue, then, and we will get to that later. A. All right, sir.

So, taking those rentals into consideration and taking the height of these two buildings, one at six-stories and one at eight, I felt that 50 cents per square foot was a fair rental value.

Q. That is the basis of a warehouse? A. That is for both. That is for the E Street property which is used as a warehouse, and for the alley building.

That is borne out by the building immediately adjacent to this alley property which was controlled by American Security and Trust Company, and which was leased at 46 cents per square foot.

Q. Was that a warehouse, too? A. Yes, that is a warehouse.

Q. All right, sir. A. That is immediately adjoining the building on the alley here.

(144) So, having arrived at a 50-cent rate per square foot, we will take the E Street parcel first with a rentable area of 85,592 square feet, which would give you a gross annual economic rental, \$42,796, allowing 5 per cent for vacancies, management, taxes, actual insurance, miscellaneous expenses, a total expense is \$9,029 which leaves you an actual net income of \$31,627.

Capitalized at 7 per cent, gives you the value of the building at 920 E. Street, and the site comprising 11,436 square feet of land. It does not include the adjoining lot which was used for parking. It gives you a valuation of \$451,814.

The 13,453 square feet used as a parking lot—and I used the original lease on it, \$22,800, which was reduced later on to about \$4,000 under that figure. But I still used it.

Q. Mr. Throckmorton, let me ask you this. A. Yes.

Q. Now, just refer to what was there prior to the time of taking. You are referring to the two parking lots now on the right of the front building? A. The parking lot fronting on E Street.

Q. What was the rental of that building, or of that land? (145) A. \$22,800.

Which figured to a figure of \$1.69 per square foot.

Deducting your expenses, management taxes, you have an annual net income of \$18,752.

Q. That is as to those two parking lots—that parking lot. A. Yes.

Q. All right. A. Being land only capitalized at 6 per cent, which puts a valuation of \$312,533 on the parking lot, giving you a total for the E Street parcel rounded to \$764,000.

Now, the warehouse area on the alley figured at the same rate per square foot, 50 cents, gives you a gross annual income of \$20,449.

Deducting your expenses, including taxes and insurance, management, and so on, we have an annual net income of \$16,123.

Capitalized at 7 per cent indicates the value of the parcel improved with the warehouse of \$230,329. Which figures to \$29.12 per square foot of land, including the improvements.

The unimproved lot 50, usable for parking, 2336 square feet, for \$1.25 per square foot, which is arrived at (146) by comparison with other parking lots all in that immediate area.

Q. Is that \$1.25 per square foot rental? A. Yes, sir.

Q. All right. A. Less your expenses of management and taxes, which would be all that would apply to that, gives you an annual net income of \$2540, capitalized at 6 per cent, indicates a value of the parking lot at \$42,333, which figures to \$18.12 per square foot.

Now, this is for the alley lot, no improvements. Total alley parcels, including the warehouse, rounded to \$272,500. which gives you a total value of all parcels estimated by the income approach as the buildings exist, of \$1,036,500.

Q. That is the total indicated price, on that, utilizing the capitalization and income method of appraisal? A. As the buildings existed, yes, sir.

Q. As the buildings existed? A. Yes.

Q. You had mentioned one rental next to the property, would you give us a few more of your rentals that you considered comparable, your warehouse rentals? A. Yes, sir.

(147) We have 1612 U Street, Northwest; four story building, square foot area of 40,000 square feet, leased in 1959 for three years at \$0.50 per square foot, leased again in 1962 for five years at 60 cents per square foot; 3155 V Street, improvements built in 1951, 17,500 square feet area, leased in 1951 for eleven years, at 96 cents per square foot.

That is a one-story building.

No. 60 Florida Avenue, Northwest, built in 1940, a two-story building 34,000 square feet; that was leased, the last lease on that was 1952 for five years at 87 cents per square foot.

2149 Queens Chapel Road, Northeast, built in 1946, a one-story building, leased in 1953 for 20 years at 87 cents per square foot.

Q. Now, with these leases—were they sufficient for your forming an opinion as to the fair rental of the property as it was improved in the present case, 50 cents per square foot? A. Well, what I did is, as I said, where you get into the buildings with more height to them—the rate comes down. 1701 Kalorama Road, Northwest, a three story building leased in 1960 for five years, figures at 48 cents per square foot.

So that, as your height increases, your rate decreases.

(148) Q. Now, you had mentioned also that you had considered the cost approach to value. Let me ask you this: In your opinion—or let me ask this: What weight did you give to the cost approach? A. I worked it out, but I did not give it any weight in final valuation. Final valuation on that was based primarily on your sales in your immediate neighborhood, which is confirmed by your income approach.

Q. Now, your final valuation— A. I might say this: Mr. Liotta, if I may—

Q. All right. A. How I arrived at that also is a comparison with the alley lot. I have several sales for what you might term "alley lots," which I will be very happy to give you if you want them.

Q. Sales that reflect on your valuation of the alley parcel? A. That is what would bear out the valuation on this vacant lot in the alley.

Q. Kindly give us a couple of those, please.

These sales you are now giving, do they refer to lot 50, the alley lot here that I am pointing at? A. Yes, that is a vacant lot.

Q. What sales did you consider comparable in arriving at your valuation for that property? (149) A. Well, we have the rear of 617 D Street, Northwest, lots 33 and 35, in square 457, containing 4859 square feet of land, which had a building on it. It was sold by Solomon Feldman to Stuart's Corner, which is Jerome Murray, May 12, 1959, for \$100,000 or \$20.50 per square foot.

Q. Was that lot Number—what was that again? A. Lots 33 and 35, Square 457.

It is the rear of 617 D Street.

Q. That sold in 1959? A. Yes.

Q. How much a square foot? A. \$20.57.

Q. Is that essentially a land sale? A. Well, it had a good building on it, but it would be substantially—it would substantiate the land value of the subject vacant lot.

(The Court) Just a moment.

Mr. Liotta, the Court understood that the witness was talking about alley sales.

(Mr. Liotta) Yes, sir. I am pointing at it now in this square.

(The Court) All right.

By Mr. Liotta:

(150) Q. Mr. Throckmorton— A. Yes. 930 G Place Northwest, between G and H, just off of 9th Street. It is across the street diagonally from the Security Bank. It is actually better than an alley. It is a cross between an alley and a street. That sold October 30, 1959. It is lot 78 in Square 375. It sold to Customers' Parking, Inc. for \$28,000, \$16.32 cents per square foot.

We have the one immediately—

Q. What was the date of that sale, Mr. Throckmorton?
A. Oct. 30, 1959.

Then 932 G Place, Northwest, it is immediately adjoining the other—lot 77, square 375, sold May 28, 1959. Warren Magee, to Customers Parking, for \$20,000, or \$11.66 per square foot.

914, 924 G Place, Northwest, Lots 81 through 86, Square 375, containing 10,290 square feet, sold August, 1958, Joseph Anderson to Superior Parking Corporation, \$129,000, at \$12.53 per square foot.

Q. Is that it now? A. I think that is enough.

Q. Now, Mr. Throckmorton, after your consideration of the sales that you have mentioned and your capitalization approach, did you arrive at an opinion of the fair market value of the subject property as of January 18, 1963?
(151) A. Yes, sir.

Q. And what, sir, in your opinion, was that fair market value? A. Well, a million one hundred and forty thousand dollars.

Q. Did that reflect the property with consideration for its highest and best use in your opinion? A. Well, Mr. Liotta, I appraised the property as I found it.

(Mr. Yochelson) I move that is not responsive.

By Mr. Liotta:

Q. What was your opinion of the highest and best use of the subject property? A. Well, as I explained yesterday, I considered the warehouse and the alley as appro-

priate use for that warehouse. And the vacant lot adjoining it could only be good for parking purposes, or as an adjunct to the warehouse, itself.

I did not and do not consider the warehouse fronting on E Street as a proper improvement to the property.

Q. Well, what was your consideration of the highest and best use of the property on E Street? A. As I said before, I would consider the loft-type (152) building, the distribution building, discount house. I know the section. I have appraised probably 35 or 40 pieces of property all in that whole neighborhood down there.

Q. And your valuation reflects the property in the highest and best use as you consider it, is that right? A. Well, I just said I do not consider that E Street parcel—

Q. I am saying, sir, your final valuation is with due consideration to what you think is the highest and best use of the property, is that right? A. Yes, sir.

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CROSS EXAMINATION

By Mr. Yochelson:

Q. Mr. Savage, when were you engaged—

(The Court) Mr. Throckmorton.

(Mr. Yochelson) I am sorry.

(153) By Mr. Yochelson:

Q. I am sorry. When were you engaged by the Government to make your appraisal in this case? A. This report was dated Feb. 20.

Q. I did not ask that. When were you engaged I asked you. A. I was going to try to give you the answer. It was prior to, some time between six weeks and two months prior February 27.

Q. What is your best judgment of when you were engaged? A. I beg your pardon.

Q. I say, what is your best judgment of the date on which you were employed? A. I would say somewhere from six weeks to two months prior to February 27.

(The Court) 19-what?

(The Witness) 1964.

By Mr. Yochelson:

Q. Do you have anything in the way of a letter of employment or something that would permit you or enable you to fix this date? A. Not with me, no.

Q. So this would be some time six to eight weeks prior to February 24, 1964? (154) A. Somewhere from six weeks to two months prior to that time; yes, sir.

Q. At the time you were first engaged, did you discuss the tentative appraisal with other appraisers employed by the Government?

(Mr. Liotta) Objection.

(The Court) The objection is sustained.

Will you gentlemen come up here, please?

(Discussion at the bench off the record.)

By Mr. Yochelson:

Q. If you do not hear any questions I ask you, do not hesitate to ask me to repeat them. A. I will.

(The Court) Mr. Yochelson, you might ask the counsel for the government if he has a letter of any kind directed to Mr. Throckmorton as to when he was engaged.

(Mr. Yochelson) All right, sir.

(The Court) That may clarify it.

(Mr. Liotta) May I have your indulgence, Your Honor. I am sure I do have somewhere.

(The Court) Proceed, Mr. Yochelson, and come back to it.

(Mr. Yochelson) Very well.

By Mr. Yochelson:

Q. Mr. Throckmorton, I think the last question or essentially the last one that Mr. Liotta asked you was (155) the question of whether or not you appraised this property in connection with your judgment as to its highest and best use, and your response was that you did.

What would you, or what do you consider to be the highest and best use of this particular property? A. Well, as I answered before, Mr. Yochelson, I consider the highest and best use of the alley property as it exists, as a warehouse and as a vacant lot immediately adjoining it for parking purposes, and I did not consider the warehouse on E Street as an appropriate improvement and I went further and said that I would consider a loft-type building, a distribution building, a discount house, as being comparable to the neighborhood.

More so than the warehouse.

Q. Is, in your judgment, the highest and best use, the use which will bring to the owner the greatest return? A. Yes, sir.

Q. Did you, in your determination of what the highest and best use for this property is, exclude its use as an office building?

(Mr. Liotta) I object. The witness testified to what he considered the highest.

(The Court) Overruled. The witness may answer.

(The Witness) As I understand it, sir, did I (156) consider it as an office building?

By Mr. Yochelson:

Q. Yes, sir. A. I did not.

Q. Why not? A. For several reasons, sir.

Q. What are they? A. I don't think that the time is ripe yet for an office building in that particular location. I would not say that it is not possible to build one. But I

would say that it would be a high risk rate on putting an office building up down there to fill it with individual tenants.

Q. Were you or were you not advised, Mr. Throckmorton, that at the date of taking, there was a lease for this building as an office building?

(Mr. Liotta) Objection.

(The Court) Overruled.

(The Witness) I was aware of a proposed lease, yes, sir.

By Mr. Yochelson:

Q. What do you mean by a "proposed lease," Mr. Throckmorton? A. There was something that was projected into the future that was not there when I appraised the property. (157) It was something that, as far as I know—I don't know whether it was going to be completed or finished or what it was. I know about the lease. I read the lease.

Q. Did you know that this lease was an executed lease binding upon the parties to it? A. Subject to certain conditions in it.

Q. Subject to what conditions? A. Well, adjustments of the number of square feet area, if the Government ever consummated it. It was a government lease for five years.

Q. It was a firm, non-cancellable lease, was it not?

(Mr. Liotta) Objection. Counsel is asking for a conclusion as to this lease, a legal conclusion.

(The Court) I think so, Mr. Yochelson. We will hear more about it. The witness has said that he read the lease.

By Mr. Yochelson:

Q. Mr. Throckmorton, when did you read the lease? A. Sometime during the course of this appraisal, Mr. Yochelson.

Q. By whom were you furnished a copy of the lease? A. Mr. Liotta.

Q. In light of the fact that there was an existing (158) lease, can you still say that you did not consider this building appropriate for office use?

(Mr. Liotta) Objection. I respectfully submit that in light of the pre-trial ruling, that the only question would be as to this lease as to highest and best use, counsel is going beyond that as to value.

(The Court) The objection is sustained. You have asked the question and the Court feels that the objection is predicated more on argument, and therefore, it should be sustained.

(Mr. Yochelson) May we approach?

(The Court) Yes.

(159) (At the Bench.)

(Mr. Yochelson) The Court pleases, I understood your ruling, you were going to permit this lease, and the question I have asked is whether or not in view of this lease, the existence of this lease, he did not consider this building to be appropriate as an office building.

(The Court) That is right.

(Mr. Yochelson) Your Honor rules I can not ask that question?

(The Court) You have asked the question and he has answered as the Court understands that he did not, even though there was a lease in existence. You are saying to him, "Even in spite of the fact that there was an existing lease, binding, you still say that. The Court feels that is argument."

(Mr. Yochelson) Well, maybe I can ask it in another way, if the Court please.

(The Court) All right.

(In open court.)

(160) By Mr. Yochelson:

Q. At the time of the taking of this property by the United States, do you know whether or not the owners of the property were then engaged in any work towards making this building into an office building?

(Mr. Liotta) Objection, on the basis of frustration of plans.

(The Court) Sustained.

By Mr. Yochelson:

Q. Mr. Throckmorton, do you know what the terms of this lease were in so far as the rental payable to the owner was?

(Mr. Liotta) For the purposes of the Court's ruling, as to highest and best use, I have a copy or if they have a copy of the lease, I think it speaks for itself. I am certainly agreeable to that.

(The Court) Well, the objection is overruled if it is an objection, because, if the witness knows, he can answer.

By Mr. Yochelson:

Q. Do you know, Mr. Throckmorton? A. Yes, sir.

Q. What was it? A. It figured to \$3.74 per square foot, before acceptance by the Government and this area would be recomputed and adjustment made in the rental, at that same rate of (161) \$3.74. The gross annual rental called for \$388,999.92.

Q. And how much was this, about \$3.88, or \$3.00 and how much per foot? A. \$3.74.

Q. That is almost eight times as much per foot as the fifty cents you put on there for warehouse purposes; is it not?

(Mr. Liotta) The question is objected to.

(The Court) Sustained.

By Mr. Yochelson:

Q. Why isn't this the highest and best return to the owner?

(Mr. Liotta) Objection. In reference to your Honor's ruling, he is going beyond the question, I respectfully submit, as to highest and best use. He is now trying to, in his question, indicate indicia of value rather than highest and best use. I object.

(Mr. Yochelson) Has Your Honor ruled?

(The Court) The objection is overruled. The witness may answer.

(The Witness) Could I have that question again?

(The Court) Mrs. Sweet.

(The reporter read the pending question.)

(The Witness) Because of the high risk rate involved in an office building there, the uncertainty as to whether it was going to be built, completed, rented—and until that (162) takes place, Mr. Yochelson, you are only working on hypothetical figures.

By Mr. Yochelson:

Q. It was rented, was it not?

(Mr. Liotta) Objection, Your Honor.

(The Court) Sustained.

The Court feels, Mr. Yochelson, that the jury are entitled to know the conditions of the lease.

(Mr. Yochelson) Very well. We would like to offer the lease in evidence.

(Mr. Liotta) Your Honor, on the basis of the possibility of highest and best use in accordance with Your Honor's order, I have no objection. As an indicia of value, I maintain my objection.

(The Court) Yes. Well, the Court receives the lease in to evidence on the basis of highest and best use only. Is that understood?

(Mr. Yochelson) Yes, Your Honor.

(Deputy Clerk) Defendant's Exhibit 1 in evidence.

(Defendant's Exhibit 1 received in evidence.)

(Mr. Yochelson) The Court please, I should like to read—

(163) (The Court) Wait a minute. Come up here, gentlemen.

(At the Bench.)

(The Court) The Court is of the opinion that you are now getting into the problem that I do not want to confuse the jury with, that this rental—do you follow me—is with an entirely different improvement than the existent—

(Mr. Yochelson) We are going to prove that we had plans and were in process of doing this work.

(The Court) I realize that. Let us not get to the end of it first, do you follow me?

(Mr. Yochelson) Well, Your Honor has prevented me from asking if the work was not in process at the time?

(The Court) I am talking about—what did they rent? They did not rent this warehouse.

(Mr. Yochelson) No, sir.

(The Court) They rented 100,000 square feet in a finished office space.

(Mr. Yochelson) Exactly so.

(Mr. Bernstein) Your Honor, part of that—what was taken was a property subject to a lease. That is part of the consideration that any buyer would have to consider. Suppose it was rented for \$1 a year and the building built; that would affect value.

(164) (The Court) I think that Mr. Yochelson gets my point—that he is talking about \$3.74 as if it were the existing property.

(Mr. Bernstein) It is still something that directly affects value—the lease on this property.

(The Court) It may affect value in the minds of the jury. But it has to be in the completed building.

(Mr. Bernstein) It still would affect the appraiser's mind.

(Mr. Yochelson) He could so testify. He ignored it completely.

(Mr. Bernstein) He cannot ignore an existing lease.

(The Court) You can certainly ignore the existing lease unless you are going to show what the lease is for.

(Mr. Bernstein) Mr. Yochelson proposes to show that and let him speak right from the lease. If the lease is our friend, he can do it within the frame that he chooses. Lord knows what his expression would be.

(The Court) You see, I would think that this would come in for your case more.

(Mr. Yochelson) This is true. But at the same time, I think that he has got to justify to the jury his (165) appraisal and justify why he disregarded an existing lease, as apparently he did.

(Mr. Bernstein) Your Honor, may I show you what I meant? If he were appraising C-4 property, zoning would be a very material factor as against, say, zoning and rural and residential. But a binding lease on the property that will affect future takers of the property again must affect his consideration of the value.

Suppose the owners in this case entered into a lease where they were to demolish the building and rent it as a parking lot at \$5,000 a year. That would be a grossly material consideration for him to take into his mind when he is valuing it.

(The Court) I am trying to keep the jury from being confused at this stage.

(Mr. Liotta) May I be heard?

(The Court) Yes.

(Mr. Liotta) I object to Mr. Bernstein's conclusions on law and fact, of course. However, I respectfully submit that what counsel is now getting at, he is attempting to utilize this lease as an indicia of value contrary, I respectfully submit, to Your Honor's ruling, as I understand Your Honor's ruling.

(166) They would be entitled to show this lease for the purposes of indicating the highest and best use of the property as I understand your ruling. I believe, and I respectfully submit that he is going beyond that and indicating a possible indicia of value which I think we covered previously in our arguments before the Court.

(Mr. Bernstein) I make a special request, Your Honor. I think this is going more or less to the heart of the case. Could Your Honor exclude the jury so we could talk?

(The Court) No. I want this case to move along, and it is crystal clear in my own mind that this jury is to understand that this \$388,000 is not for the present property, as it presently exists.

(Mr. Bernstein) We do not intend that. We intend to put in something else.

(Mr. Yochelson) What we want the jury to know—

(Mr. Bernstein) We want to take it step by step.

(The Court) You know he testified it was 46 cents from the American Security for warehouse purposes, right next door.

(Mr. Yochelson) Yes.

(167) (Mr. Bernstein) Yes.

(The Court) He then testified as to other properties at fifty cents.

(Mr. Yochelson) And 87 cents and \$1.25.

(The Court) Then he says in his opinion it is best used for a loft-type building or warehouse.

(Mr. Yochelson) Yes.

(The Court) You are bringing out \$388,000 rental for office space.

(Mr. Yochelson) Yes, sir.

(The Court) But it is not for this present property.

(Mr. Yochelson) No, but if he is an appraiser that is worth his salt.

(Mr. Liotta) I object to that.

(Mr. Yochelson) He should be able to say that it would take X-dollars to put the building in condition to get this.

(The Court) No. I certainly am not going to have this witness be the one. Now, it may be on rebuttal, do you follow me? But the responsibility is on you to prove, and you are not going to prove it through this witness.

(Mr. Yochelson) I have the right to cross examine him and ask him whether he considered these things, Your Honor.

(168) (Mr. Liotta) He has indicated what he considered the highest and best use to be.

(Mr. Bernstein) He says the highest and best use is fifty cents for warehouse base.

This property was legally bound, Your Honor, to be used as office space. The contract which ran with the land required it to be used as office space. We will make a motion to strike this witness' testimony at the proper time, because he did not consider the actual property.

(The Court) Bear in mind now that this Court has given a lot of thought to it, too. This is not forever. This is five years. Now, the owner of this property may have gone broke at the end of ten years.

(Mr. Bernstein) That is for the jury.

(The Court) Yes.

(Mr. Bernstein) The fact is at the outset it was legally bound to be used as an office building.

(Mr. Yochelson) For five years, with options.

(Mr. Liotta) An appraiser in real estate appraises property as a total unit without regard to individual relationship. He has a perfect right to take into consideration what he feels should be considered.

(169) (Mr. Bernstein) We are entitled to cross examine on legally bound property. Is there any doubt in the Court's mind if there were a lease requiring this to be rented at \$1.00 a year, the Government would rely on that as controlling in value and at the same token at \$10 million.

(The Court) Do you understand my position?

(Mr. Yochelson) I do. I am confused at the restrictions imposed on me by Your Honor. I think this cross examination should permit me some liberty.

(The Court) So do I. I am trying to give it to you. You have already brought in the lease. You brought in the amount.

(Mr. Yochelson) Yes. Your Honor, you prevented me from asking if he knew at the time of the taking this property was in the course of construction.

(The Court) My particular point is that at this stage, the burden being on you—

(Mr. Bernstein) But, Your Honor, the witness said there is uncertainty. It is uncertain whether the building will be built. Don't we have a right to show we were building it and had a perfect right? Is that not relevant?

(Mr. Liotta) Your Honor, we are getting to frustration.

(170) (The Court) We would be two days on this witness, then.

(Mr. Yochelson) I do not propose to be two days with this witness. We have it right here—we have the right to show that he did not have a right to stay.

(The Court) You can show the highest and best use.

The Court stays with its ruling.

(171) (In open court.)

(Mr. Yochelson) Your Honor please, I should like to read to the jury the property owners exhibit 1, which is the lease admitted in evidence.

(The Court) All right.

(Mr. Yochelson) This is, Your Honor, U.S. Standard Form No. 2 revised, approved by the Secretary of the Treasury, May 6, 1935.

"Between Albert Dicker and David Lawrence—
Lease."

(The Court) Wait just a moment.

Read back what you have to Mr. Yochelson.

(Reporter reading):

"U.S. Standard Form No. 2 (Revised) approved by the Secretary of the Treasury, May 6, 1935, 2-104.

"NEG. P. L. 152, Sec. 302 (c) (2), GS-03-B4899.

"Lease between Albert P. Dicker and David Lawrence and the United States of America."

(The Court) The form was approved in 1935?

(Mr. Yochelson) Apparently so, yes.

(The Court) All right.

(Mr. Yochelson) Let me repeat:

(172) (Mr. Yochelson) (reading):

"U. S. Standard Form No. 2 (Revised), approved by the Secretary of the Treasury, May 6, 1935, 2-104.

"NEG. P. L. 152, Sec. 302 (c) (2), GS-03-B4899.

"Lease between Albert P. Dicker and David Lawrence and The United States of America.

"1. This lease, made and entered in this 8th day of August in the year one thousand nine hundred and sixty-two, by and between Albert P. Dicker and David Lawrence, whose address is 7400 Glenbroom Road, Bethesda, Maryland, for themselves, their heirs, executors, administrators, successors, and assigns, hereinafter called the Lessor, and The United States of America, hereinafter called the Government:

"Witnesseth: The parties hereto for the considerations hereinafter mentioned covenant and agree as follows:

"2. The Lessor hereby leases to the Government the following-described premises, viz: The entire premises and Annex known as 920 E Street, Northwest, together with all appurtenances thereunto belonging, situated on Lots 48, 50, and 831 in Square 378 of the District of Columbia.

"To be used exclusively for the following purposes (173) (see instruction No. 3): Governmental purposes.

"3. To have and to hold the said premises with their appurtenances for the term beginning not later than May 16, 1963, and ending with a date five (5) years after the premises are accepted for occupancy by the Government. It is understood and agreed that the exact date of the five (5) year firm period will be established by Supplemental Agreement after acceptance of the space.

"4. The Government shall not assign this lease in any event, and shall not sublet the demised premises except to a desirable tenant, and for a similar purpose, and will not permit the use of said premises by anyone other than the Government, such sublessee, and the agents and servants of the Government, or of such sublessee.

"5. This lease may, at the option of the Government, be renewed from year to year at a rental of Four Hundred Seventeen Thousand Dollars (\$417,000) and

otherwise upon the terms and conditions herein specified, provided notice be given in writing and otherwise upon the terms and conditions herein specified, provided notice be given in writing to the Lessor at least ninety (90) days before this lease or any renewal thereof would (174) otherwise expire; Provided that no renewal thereof shall extend the period of occupancy of the premises beyond the date of five years from the ending date of the established five year firm lease period.

"6. The Lessor shall furnish to the Government, during the occupancy of said premises, under the terms of this lease, as part of the rental consideration, the following:

"All services, utilities, maintenance, etc., as set forth on Sheet 2-A and 2-B attached hereto and made a part hereof with the following exception;

"The furnishing of all meterable utilities such as gas, electricity, and water, which are excluded from the rental consideration. Meters for the foregoing utilities to be provided by the Lessor at no cost to the Government.

"7. The Government shall pay the lessor for the premises rent at the following rate: \$388,999.92 per annum, payable in monthly installments of \$32,416.66.

"All rental payments under this lease will be made on a calendar month basis in arrears without the submission of an invoice or voucher.

(175) "Payment for any part month rental will be made at the end of the first calendar month of the term of the lease.

"8. The Government shall have the right, during the existence of this lease, to make alterations, attach fixtures, and erect additions, structures or signs, in or upon the premises hereby leased (provided such alterations, additions, structures or signs shall not be detri-

mental to or inconsistent with the rights granted to other tenants on the property or in the building in which said premises are located); which fixtures, additions or structures so placed in or upon or attached to the said premises shall be and remain the property of the Government and may be removed therefrom by the Government prior to the termination of this lease, and the Government, if required by the lessor, shall before the expiration of this lease or renewal thereof, restore the premises to the same condition as that existing at the time of entering upon the same under this lease, reasonable and ordinary wear and tear and damages by the elements or by circumstances over which the Government has no control, excepted: Provided, however, that if the Lessor requires such restoration, the Lessor shall give written notice thereof to the Govern- (176) ment sixty days before the termination of the lease.

"9. The Lessor shall, unless herein specified to the contrary, maintain the said premises in good repair and tenantable condition during the continuance of this lease, except in case of damage arising from the act or negligence of the Government's agents or employees. For the purpose of so maintaining the premises, the lessor reserves the right at reasonable times to enter and inspect the premises and to make any necessary repairs thereto.

"10. If the said premises be destroyed by fire or other casualty, this lease shall immediately terminate. In case of partial destruction or damage, so as to render the premises untenable, either party may terminate the lease by giving written notice to the other within fifteen days thereafter, and if so terminated, no rent shall accrue to the lessor after such partial destruction or damage.

"11. No member of or delegate to Congress or Resident Commissioner shall be admitted to any share or part of this lease or to any benefit to arise therefrom. Nothing however, herein contained shall be construed

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to extend to any incorporated company, if the lease be for the general benefit of such corporation or company.

"12. Lease rider containing Paragraphs 13 and 15, (177) GSA Form 1714, Facilities Nondiscrimination Clause, and Sheets 2-A and 2-B are attached hereto and made a part hereof. Deletion of the words 'the day of' in Paragraph 5, the words 'payment shall be made at the end of each' in Paragraph 7, and Paragraph 14 of the Lease Rider in its entirety, were made before this lease was signed by either party. Any and all requirements of Invitation and Bid No. GS-PBS-03-562 and Addenda, Government's solicitation for quotations dated July 9, 1962, the Lessor's offer dated July 18, 1962 and the Government's acceptance letter dated August 8, 1962, are all incorporated by reference and made a part of this lease.

"In witness whereof, the parties hereto have hereunto subscribed their names as of the date first above written.

Signed "Albert P. Dicker,

"David Lawrence

"United States of America

"By H. A. Abersfeller,

"Regional Administrator

"General Services Administration, Reg. 3."

(178) And it bears the names of certain witnesses.

The Lease Rider, Region 3, is a covenant against contingent fees.

The lessee warrants that he has not obtained any contingent fees. There are instructions to be observed in execution of the lease. Non-discrimination employment rider requires that there be no discrimination as to race, color, creed or origin of any persons doing work: As a facilities non-discrimination rider which, as used in this section, the term "facility" means stores, shops, restaurants, cafeterias, rest rooms and any other facility of a public nature in this

building in which the space covered by this lease is located. The lessor agrees that he will not discriminate by segregation or otherwise against any person or persons because of race, creed, color or national origin, in refusing to furnish to such person or persons the use of any facility including any and all services, privileges, accommodations and activities provided thereby.

Sheet 2. As the services, utilities, maintenance, and so on, building operating services required. The lessor shall furnish the following to be included in the rental price:

(179) "Electric current for lighting, for office appliances and machines.

"Furnish and install the initial and placement of electrical lamps, ballast, starter, electric fuses, heat to maintain temperature of not less than 72 degrees Fahrenheit during the heating season.

"Janitorial and cleaning service including cleaning of office areas—daily five days a week, including but not limited to vacuuming of carpeting; machine scrubbing all terrazzo or ceramic tile floors in corridors, lobbies and toilets, within the premises. Low dusting of partitions, desks, chairs, window sills, radiators and convectors; sweeping of interior and exterior dock entries; polishing of glass and metal on main entrances. Sweeping and dust mopping all rooms other than carpeted rooms, corridors, stairs and elevator doors—Venetian Blinds and other high objects.

"Window washing, including glass partitions if any.

"Fourthly, maintenance of floors including cleaning and waxing appropriate to the type of floor—soap, towels and toilet tissues, hot and cold water, running, chilled drinking water—located above the ground floor level and the basements including maintenance operation.

• • •

(180) "Air conditioning to be operated at such time as

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needed to maintain an indoor temperature of 76 degrees Fahrenheit dry bulb and 64 wet bulb.

"Sidewalk cleaning including snow and ice removal, lobby directory board service, building operating service including toilet servicing shall be furnished between the hours of 7 a.m. and 6 p.m. five days a week, except cleaning, which will be accomplished after office hours, including use of electricity, elevators and toilet facilities without additional payment.

"If * * * including light and or air conditioning are required by the government on an overtime basis beyond the above specified hours, they will be furnished by the lessor and reimbursement to the lessor for services will be limited to extra cost of electricity, fuel and personal services as authorized by the Government.

"Maintenance and Repairs. Lessor will be required to maintain the lease premises in good repair and tenable condition during the tenancy of the lease. The successful bidder will be responsible for the following:

"Exterior and interior structural maintenance, maintaining in a weathertight condition the exterior of the building including the repair and preservation of all doors, window sashes, sills and frames, and shall replace (181) new glasses as needed.

"Shall be responsible for maintaining in good repair and operating condition all mechanical, plumbing and electrical equipment furnished by him and shall promptly replace any parts which may become worn out—or because of defective parts.

"Maintain and keep in good repair and condition all driveways and off street vehicle parking areas.

"To paint * * * at the end of each three year term. The colors of the paint to be selected by the government.

"Maintenance of all interior and exterior mains, lines, including repair and replacement of all parts to plumbing and meters, utilities and services. Any other

maintenance not otherwise specified herein required to maintain the premises in good repair and tenantable condition during the continuance of the lease.

"All repairs and replacements shall be of quality equal to that used in the original construction of the devised premises * * * and in an orderly fashion."

By Mr. Yochelson:

Q. Is this the lease you were familiar with at the time you made your appraisal? A. Well—

(182) (Mr. Liotta) Excuse me. May I now request Your Honor if you would, sir, to have an instruction to the jury that this lease is for the purposes of highest and best use, and not indicia of value?

(The Court) The Court will instruct the jury at a later time. The Court has already stated that the lease has been received in evidence solely for the purpose of highest and best use, and that is all you are offering it for.

(Mr. Yochelson) Yes.

(The Court) All right.

By Mr. Yochelson:

Q. Mr. Throckmorton, in your judgment, did the existence of this lease on the date of the taking by the government increase the fair market value of the property?

(Mr. Liotta) Objection, Your Honor.

(The Court) The objection is sustained.

The Court understands, Mr. Yochelson, that you agree that you are not introducing the lease to show the fair market value. You are doing that to show the highest and best use of the property.

(Mr. Yochelson) If Your Honor please, it seems to me the lease is in evidence to show its highest and best use.

(183) (The Court) Yes.

(Mr. Yochelson) We contend its highest and best use is an office. We contend there was a lease in existence.

(The Court) Yes.

(Mr. Yochelson) We contend that a buyer, a willing buyer on that date, having such a lease and buying this property for its highest and best use would pay a price different than they would pay if there were no such lease.

(The Court) Mr. Yochelson, there are assumptions in that statement that you have just got through making that the Court does not agree with at all. The government may want this particular property. This witness may be talking about the highest and best use for commercial purposes.

(Mr. Yochelson) I have only stated and I have asked—

(The Court) The Court has already received it on the basis that you can show the highest and best use, Mr. Yochelson, but not as an indication of the fair market value so far as money is concerned on just compensation.

(Mr. Yochelson) I do not see how we can separate the two. If the Court please.

(The Court) Just a moment. That is not for you and (184) that is not for me. That is for the jury to determine.

(Mr. Yochelson) The Court please, may we be permitted to argue this in the absence of the jury? I think it is of vital importance.

(The Court) The Court is of the opinion that it has already been argued.

(Mr. Yochelson) Very well.

By Mr. Yochelson:

Q. I take it, Mr. Throckmorton, that in your view of this property, you disregarded its use as office building purposes for the reasons you have indicated. A. Let me understand that, clearly, Mr. Yochelson. Did I consider it for office purposes, is that the question?

Q. Yes. Did you consider it as being a desirable building for office purposes? A. No, sir. Definitely I did not. Under the construction program—that was laid out here, this called for an office building on the front part of that land with a bridge over a thirty foot alley, and another office building back in the alley. The only connection could be between, with an overhead bridge, and certainly no individual tenants would go down there and rent office space up in an alley building.

(185) Q. You say that even though the government did rent it?

(Mr. Liotta) Objection.

(The Court) Sustained.

By Mr. Yochelson:

Q. Mr. Throckmorton, did you know that those two buildings for years had been connected by an overhead bridge permitting their use as a single unit? A. The warehouses?

Q. Yes, sir. A. I did not.

Q. Would that have made any difference in your appraisal? A. No, sir, because two warehouses would certainly come under an entirely different category than an office building situated on an alley.

Q. Now, do you know that plans had been drawn and aproved and a permit issued for the improvement of these buildings into office building space?

(Mr. Liotta) Objection.

(The Court) The witness may answer that question. The Court understands he has already answered.

(The Witness) Yes, sir. I had four sets of figures furnished me as to a proposed remodeling of these buildings.

(186) By Mr. Yochelson:

Q. I did not ask you that. I asked if you knew whether plans has been prepared. A. Yes, sir.

Q. Did you see the plans? A. Yes, sir.

Q. Did you know that a building permit had been issued by the District of Columbia to permit the work in accordance with these plans? A. I am not sure whether I did or not, Mr. Yochelson.

Q. Did you make any effort to find out, sir? A. I would assume that I did.

Q. What did you find out? A. I just said I do not remember. It would not have made any difference.

Q. It would not have made any difference? A. No, sir.

Q. Do you know whether or not those plans as drawn, entailed the combined use of the two buildings with a connection? A. Well, I would not dispute that, sir.

I did not believe I understood that. I thought I answered it correctly.

Q. Did you know whether the plans provided for a (187) connection between the two buildings? A. Yes, sir, an overhead bridge.

Q. Mr. Throckmorton, the rental value of this building for, I think you said a discount store, would that be 50 cents a foot?

(Mr. Liotta) Objection. I respectfully submit again that this is a hypothetical building on the property. I respectfully submit the appraiser appraised it as he found it, not in its highest and best use but as a reflection of its highest and best use.

(The Court) Overruled. The witness may answer.

(The Witness) No, I would consider, Mr. Yochelson, that a building such as I have described would rent for more than fifty cents per square foot, particularly on the ground floor, and possibly the second floor.

By Mr. Yochelson:

Q. How much per square foot would it rent for? A. I do not know. I would have to study that.

(Mr. Liotta) We are getting into a speculative situation again.

(The Court) Come up here, gentlemen.

(At the Bench.)

(188) (The Court) I do not follow your argument now. He says it is one million one hundred forty thousand and he says the highest and best use is a loft-type structure or discount house, in his opinion. It certainly is not illogical to ask him how much it would rent for in his opinion.

(Mr. Liotta) Well, Your Honor, again, I respectfully submit that we are getting into the posture of a hypothetical office building, and the income returnable from that.

(The Court) He has testified that he used that form.

(Mr. Liotta) He used the form I respectfully submit on the improvements as they existed.

(The Court) But the point is he has testified as to the highest and best use.

(Mr. Liotta) Yes, sir.

(The Court) All right. Now, the question is: How much would it rent for.

(Mr. Liotta) Your Honor, if I may say so, sir, that the income returnable to the building as they existed, is one thing, that is, what he had originally testified to. Now, his opinion of highest and best use was for the type of building you are talking about.

(189) I do not deny that. But to then go into what these buildings would rent for is again a projection of a hypothetical building and an estimate of return on these buildings.

(The Court) Not for the highest and best use that he has testified to. He can give an opinion, because he has already indicated he knows the answer. That is why he put that price on. It is one of the methods that he used. If he says "No, I do not know what it would rent for," that is for the jury to determine.

(190) (In Open Court.)

By Mr. Yochelson:

Q. Did you make any effort to determine what rental return this building would earn for its owners for the purposes that you described to be its highest and best use, that is for retail, discount store or distribution building?
A. No.

Q. Why not? A. I did not think it was necessary. I appraised the property as I found it.

Q. All right, then. Do I understand that you did not appraise it for its highest and best use?

(Mr. Liotta) Objection. The witness testified that he had considered the highest and best use.

(The Court) The Court would be interested, Mr. Yochelson, on the \$1,140,000 that the witness testified to, as to the value, whether that was predicated on the highest and best use.

(Mr. Yochelson) The witness, of course, testified this was predicated on fifty cents a foot which he said was its value for storage.

(The Court) Let use clarify it on cross examination.

(Mr. Yochelson) Yes, sir.

(191) By Mr. Yochelson:

Q. Mr. Throckmorton, have you just testified or have you not, that, as a discount store this property would bring more than fifty cents a foot? A. Mr. Yochelson, I said "Yes," but that would have to be subject to a number of conditions. It would have to be subject to the type of property that was built there or remodeled, as to how much expense was entailed, what was the outlay, whether it was air conditioned, what kind of service was rendered. I mean, the field is wide.

By Mr. Yochelson:

Q. Am I correct in saying that because of these conditions you did not value the property for anything other than a warehouse?

(Mr. Liotta) Objection.

(The Court) Overruled.

Do you understand the question?

(The Witness) I think so, Your Honor.

(The Court) All right.

(The Witness) I valued the property as I found it, and I approached it from all of the appraisal methods. Now, the \$1,140,000 was not arrived at, that was a correlation. The final valuation was based on sales in the locality, ground sales, and the value of the improvements as they existed.

(192) If you destroyed the building on E Street, took it away—

(Mr. Yochelson) I move that be stricken. It is not responsive to my question.

I asked Mr. Throckmorton if it is a fact that he appraised this building as a warehouse and not for any other higher or better purpose.

(The Court) All right.

By Mr. Yochelson:

Q. Did you answer that yes or no, sir? A. Yes, I will answer your question, Mr. Yochelson. I appraised the building as it existed, plus some earning value which was arrived at by comparison.

(Mr. Yochelson) I move that this witness' testimony be stricken in its entirety. He has testified that its highest and best use was for some other use than he testified.

(The Court) Wait. You are moving that it be stricken.

(Mr. Yochelson) Yes, sir.

(The Court) Denied.

By Mr. Yochelson:

Q. Is it unusual for an appraiser, Mr. Throckmorton, in determining that a building is entitled to some better value for some use other than it is then being adapted for?

(193) Isn't that what you had to do as an appraiser? A. On occasions, yes.

Q. Why didn't you do it here? A. I based, as I told you before, the valuation was arrived at from the depreciated value of the improvements, plus land.

Q. Were you instructed by anyone to appraise it in this particular method? A. No, sir.

Q. Were you instructed by anyone to disregard this lease? A. Why, certainly not.

Q. What did you think, Mr. Throckmorton, this land was worth, exclusive of any improvements? A. The E Street parcel figured to \$39.50 per square foot of land, including improvements.

Q. Now, your value of the land alone, please, sir. A. The land used as a parking lot immediately adjacent to the building, itself, figured to \$23.23 per square foot, based on the lease of the lot.

Q. What about the land under the building? A. There was no land under this building. This was a parking lot. The land, the alley parcel—

Q. No, sir, the land under the building on E Street, Mr. Throckmorton. (113) A. I have them figured together, at \$39.00—

Q. Take them separately, if you will. A. I can figure them separately.

Q. I would appreciate it if you would.

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(196) By Mr. Yochelson:

Q. Have you been able to determine the valuation you placed on the land as opposed to the building?

(Mr. Liotta) May I note my objection to the breaking down of the unit in this particular case between land and

building? I submit it is a total unit in itself. The total price should so reflect.

(The Court) The objection will be overruled.

(The Witness) Mr. Yochelson, by comparison I estimate the value of the E Street parcel, containing 24,980 square feet, at the rate of \$35 per square foot, if vacant, which is a total of \$874,302.

From that I would estimate the cost of removing the improvements—

By Mr. Yochelson:

Q. Just a moment.

I have not asked you that. I asked what you valued the land at. Now, let me see if I understand you correctly. Do I understand that you valued the 24,980 square feet of land, facing E Street at \$35 a foot or a total of \$874,302?

(Mr. Liotta) I object to it. The witness was going to state his final price of that land. He included cost, as I understand his answer, of demolition of the property. So, it would not be that figure. Counsel (197) precluded the witness from answering.

(Mr. Yochelson) If the Court please, this witness has so frequently sought to volunteer so much more information than he has been asked—

(The Court) Wait a moment.

Gentlemen of the jury, you are the ones to determine the evidence in this case.

(Mr. Yochelson) I understand that, Your Honor.

(The Court) Now, any characterization of yours of the testimony is not pertinent to this trial. The question now is that you want this witness to answer—what is the question?

(Mr. Yochelson) The value of the land, as distinct from the buildings.

(The Court) All right.

(The Witness) He did not let me finish, Your Honor.

(The Court) All right.

(The Witness) We would have to estimate the cost of removing the improvements, if we are going to treat the land as vacant.

(Mr. Yochelson) Object. It is not responsive, Your Honor.

(The Court) The Court feels that it is. Proceed.

(198) (The Witness) The net value of the E Street parcel, after the improvements were removed, would be \$794,244.

By Mr. Yochelson:

Q. What was the figure of \$874,302 you gave us a moment ago? A. At the rate of \$35 per square foot, Mr. Yochelson, if vacant.

Q. And what is \$794,244—what does that represent? A. Less the cost of razing the present improvements.

Q. Do I understand you that the difference between \$874,302 and \$794,244 represents the cost of removing the improvements? A. \$80,058, yes, sir. Seven dollars per square foot times 11,436 square feet.

Q. This is the cost of removing these improvements? A. Yes, sir.

Q. How did you determine that? A. From two sources. From an engineer with the Prescott Construction Company. Also from the actual figure submitting on the razing of the Raleigh Hotel, which was seven dollars per square foot.

Q. I take it then that you are familiar with the Raleigh Hotel property in the entirety? A. Yes, sir.

(199) Q. What did that property sell for, incidentally?

(Mr. Liotta) Objection. The witness testified to the sales he thought were comparable. Counsel is going beyond the scope of direct examination. I object.

(The Court) Overruled.

(Mr. Liotta) May I request that the witness give the name of the buyer and seller and date of sale before he gives the price.

(The Court) Yes.

First, the question is—are you familiar with it?

(The Witness) Yes, sir.

Shall I answer it, Your Honor?

(The Court) Yes.

(The Witness) The Raleigh Hotel, being Lots 803, 808 and 808-A, Square 322, containing 29,776 square feet of land, improved with an eight story, 400 room hotel, Raleigh Properties, Inc., to Hamilton Properties, Inc., deed dated May 25, 1962—

(Mr. Liotta) Just a moment. I object. This was a sale of a depleted hotel. I respectfully submit—I do not want to testify—but I submit there is no comparability.

(The Court) There is no what?

(Mr. Liotta) No comparability. I object.

(200) (The Court) Wait a moment.

The Court understood, Mr. Throckmorton, when you testified to the jury, that you used the words “near comparables.”

(The Witness) I did.

(The Court) All right. You may answer.

(The Witness) Deed recorded May 25, 1962 and recorded May 28, 1962, indicates a sales price of \$2,525,000 but the deed specifically included all real estate, furnishings, fixtures, restaurant, bar equipment, business records, indicating that the purchaser bought a complete operating hotel and not land only. So, I did not regard it as anywhere near comparable in any sense of the word.

(Mr. Liotta) My objection is to the conclusion of this in the testimony, that it includes personal property and a business. I ask that it be stricken.

(The Court) All right.

(Mr. Yochelson) Mr. Throckmorton, even though you did look at the building being torn down—

(The Court) Wait.

The motion to strike this testimony will be denied.

By Mr. Yochelson:

Q. Would you please continue, then, sir, and answer (201) this: You did not consider it as—strike that.

Isn't it true that this building was razed shortly after it was purchased, in the process of being razed now?

(Mr. Liotta) Object. If this was in reference to this sale, that is one thing. I submit that has not been shown.

(Mr. Yochelson) Your Honor please, the witness has testified they were buying a hotel and a going business. The fact is they are taking or tearing it down and they are buying the land.

(The Court) But would we not have to try the entire Raleigh Hotel now?

(Mr. Yochelson) No more than we have to go ahead and try the cases of T Street, Kalorama Road and others he has testified to.

(The Court) Yes. But these gentlemen know the Raleigh Hotel.

(Mr. Yochelson) Yes. I think it is just as helpful for them to know the price of a piece of ground within two or three blocks as it is to know the price of property several miles removed, which Your Honor permitted this witness to testify about.

(The Court) Proceed.

(202) By Mr. Yochelson:

Q. You do know the price, do you? A. \$2,525,000, yes. That was a sale in 1962.

Q. How many square feet were involved? A. 29,776 square feet.

Q. How much is that per square foot? A. I did not work that out as to how much a square foot it was. There was a subsequent sale after the date of taking—

Q. I have not asked about any sales after the date of taking.

I do not want you to testify with respect to any. But is it not true that this \$2,525,000 reflects the cost, less the cost of demolition? A. No. They bought a complete operating hotel. There is no degree of comparison whatsoever. What they did with it later on, six or eight months later and resold it—and what they are doing to it now has nothing whatever to do with the date of taking.

Q. Didn't they buy this to put an office building up?

(Mr. Liotta) Objection. That asks for a conclusion.

(Mr. Yochelson) If he knows.

(203) (The Court) He may answer if he knows.

(The Witness) The first sale evidently was not—Your Honor, because it was sold subsequent, it was sold months after that.

(The Court) All right.

By Mr. Yochelson:

Q. Did you make any inquiry to determine the purpose for which this property was sold? A. When—which sale?

Q. The sale as to which you testified. A. Yes.

Q. To whom did you speak? A. I do not remember which ones of the gentlemen I talked with, sir.

Q. With whom were they connected? A. One was Frank Hughes, I think. I am not sure. We talked with two or three different ones.

Q. What was Frank Hughes' association with it? A. He has been mixed up in several of the transactions down there.

Q. Is he one of the owners? A. He may be now, I do not know. I have not followed this last sale up because it is so far behind the date of taking.

(204) Q. At the time you talked with him, was he an owner? A. I do not remember, sir.

Q. Why did you talk with him? A. Because I knew some way from information I gathered, that he had something to do with it and was familiar with it.

(Mr. Yochelson) Would Your Honor excuse me a moment?

(The Court) Certainly.

By Mr. Yochelson:

Q. Mr. Throckmorton, did you examine the Raleigh Hotel sale, the contract for sale?

(Mr. Liotta) Objection, unless he identifies which sale.

(Mr. Yochelson) The one as to which he has testified.

(The Witness) Did I examine the contract—no, sir.

By Mr. Yochelson:

Q. Then you do not know any of its terms? A. I took it off the record.

Q. The only thing appearing on the record was stamps which enabled you to get the sales price; right? A. No, the deed specifically included all real estate, furnishings, restaurant, bar equipment—business (205) records.

Q. All right.

Now, let us get back to our property. You testified that you appraised a portion of the E Street frontage, that portion used as a parking lot, for \$23.23 a foot, based on a lease? A. Yes, sir.

Q. How long did that lease have to run? A. I do not recall. At the time I figured it on the basis of the original lease which was \$22,500, or \$22,800. Later on that figure was reduced.

Q. Did you make any inquiry as to the duration of this lease? A. I probably did. I talked to the man that operates the lot down there. I do not recall.

Q. What do your notes show that he told you? A. I have no notes with me.

Q. What do you have with you? A. The appraisal.

Q. That does not have the lease information? A. No, sir.

Q. Did you consider that to be important? A. That was not particularly important, no. It was based on so much per square foot. The number of parking (206) lots in that immediate neighborhood that run for various periods of time.

Q. If this were a month-to-month lease, would it influence your thinking at all? A. It would attach more risk to it, yes.

Q. You mean more risk or more benefit to the owner? A. There would be more risk to the owner, a month-to-month agreement would not be as beneficial as a lease.

Q. Do you consider that the use of this lot as a parking lot was its highest and best use? A. Not necessarily so, no.

Q. What did you consider its highest and best use? A. At this time I have already stated that a half a dozen times.

Q. Not as to this lot you have not. A. Beg pardon?

Q. As to this lot have you? A. The front lot, yes.

Q. Parking lot? A. No, I did not say it was its highest and best use.

Q. What is its highest and best use? A. The same purpose that the older building would be, the warehouse.

(207) Q. You do not think that the highest and best use of this lot would be for an office site? A. No.

Q. What has been the trend in that downtown area with respect to the erection of office buildings? A. I am sorry, I did not catch the first part of that question.

Q. What has been the trend, in what direction has it been moving? A. Office building sites have been moving westward and north to northwest.

Q. Have they not been moving eastward? A. Only on very rare occasions.

Q. Do they have one at 6th and Indiana Avenue? A. I know all about that building. I appraised it.

Q. A new office building just under construction there, right? A. It is under construction, yes.

Q. As a matter of fact, there are two under construction in that block, are there not? A. One on the corner, yes, sir.

Q. What about the effect of the new office building at 12th and E built by Charles Smith? A. I took that into consideration.

(208) Q. Did that represent a trend eastward? A. Yes.

Q. How about the Perpetual Building? How close is that to this? A. The Perpetual runs from 11th through to 12th and E Street.

Q. How about the PEPCO Building? What effect does that have on this? A. I do not know of any particular effect it would have on it. It seems the type of structure that is in that neighborhood. You would not compare the PEPCO Building with a new office building.

Q. Isn't that a fairly good office building? A. Yes, sir. Occupied by PEPCO.

Q. Don't you have any office buildings at 11th and H, fairly new—the Washington Gas-Light Company, at 12th and E, 11th and E, and don't you know of some that are

coming even on 9th Street? A. There has been some remodeling of buildings on 9th Street; yes, sir. To the best of my knowledge, there are no new buildings going up on 9th Street.

Q. You do not see a trend eastward? A. I did not say that.

Q. Well, do you see a trend eastward? (209) A. A very slow trend eastward.

Q. This property is just a half block removed from the Federal Triangle, is it not? A. Yes.

Q. Would you not, therefore, say that it is a better office building location than 9th and G that you testified about? A. No.

Q. You do not? A. No, sir.

Q. Why not? A. Because I do not. There is nothing particular—this is not Pennsylvania Avenue. This is back on E Street. 9th and G Street is further up, with a better class of property. Take your Federal Triangle out. That has nothing to do with the valuation of this property on here.

Q. The Federal Triangle has nothing to do with the value of this property here—9th and G is the Gayety Theater, is it not? A. Not that one. One of those that I used as a comparable was the old Gayety Theater, yes. There are three or four up there within a block of each other.

Q. Do you think that is better than this? A. Yes, sir.

(210) Q. Why is it better than this? A. Well, that is my opinion, sir.

Q. On what facts is that opinion based? A. Based on sales in the surrounding neighborhood.

Q. What sales in the surrounding neighborhood led you to believe that 9th and G is better than this? A. I have gone into all of them, Mr. Yochelson.

Q. You gave us what you said was the best sale was the sale at 12th and E, at \$75 a foot. A. I did not say it was best.

Q. I thought you did. A. No.

Q. Did you testify that that was the highest priced that you had run into? A. I said to the best of my knowledge, according to the records, that is the highest price paid for land in that downtown section.

Q. As a matter of fact, there have been higher prices in that area, too, have there not? A. Higher prices in that area?

Q. Higher prices than \$75 a foot? A. Not that I know of.

Q. Do you know what the Evening Star property sold for? A. You are going down on Pennsylvania Avenue.

(211) Q. That is 11th Street, primarily. A. Now, if we are going to do that, then we are going down the other way, we are going to the Apex Building at 4th and Pennsylvania Avenue, where the property sold for about a third as much. If we are going to go up there and open that field up, we will take them all.

Q. You do not consider the Star Building to be comparable? A. No, it is so much better, Mr. Yochelson.

Q. Why is it better? A. It is a better location; it is a corner building and overlooks Pennsylvania Avenue. There is not any degree of comparison between the two properties.

Q. What about the total area of land here—how much have you got in all? A. We have 24,980 square feet in the E Street parcel.

Q. Is that better or worse than a piece of property with 7,000 or 6,500? A. Better than what?

Q. Does this have an assemblage value because of its total area? Is that worth more per foot than a piece that has 7,000 feet? A. That is debatable.

Q. What is your opinion? (212) A. It could go either way.

Q. You mean it could be worth less because of that? A. It could be, or it could be worth more.

Q. Is it worth more or less? What is it? A. Your depth to that front property reflects against it. It is about 190 feet depth.

Q. Do you consider that excessive? A. Sir?

Q. Do you consider that to be an excessive depth? A. 190 feet?

Q. Yes. A. Yes, 190 feet is excessive depth.

Q. What is the total frontage on E Street? Can you tell us by referring to your plat, Mr. Throckmorton? A. Yes. Your figures are right there by you.

Q. I asked you the question. A. O.K.

(Mr. Liotta) For the purposes of saving time, may I hand the witness Plaintiff Exhibit 1 which is a plat of this property?

(The Court) All right.

(The Witness) You want the total frontage, Mr. Yochelson.

By Mr. Yochelson:

Q. Yes. (213) A. 118.67 feet.

Q. Do you think that this would make a very attractive office building site? A. I would not say that it would.

Q. You would not say that it would. A. No, I said it is perfectly possible to put an office building on that site.

Q. Do you still consider, in view of that frontage, that the depth is excessive? A. Yes, I do, because your average building you will find it takes from around ten to fifteen thousand square feet; and your better buildings are more compact. They have either more width or less depth.

Q. What is the depth of the new Bender Building? A. You put a building on this depth and you have got to have inside court lights for air and for lighting. There is no better example than the Masonic Building in the 1700 block of H Street which we appraised. All of the interior of that building. That is one of the largest office buildings in the city. None of that inside space has any lighting.

Q. But they get just as much rent for it, do they not—without the light?

(214) (Mr. Liotta) Objection. We are getting into a collateral issue.

(The Court) Sustained.

By Mr. Yochelson:

Q. Is it not true that with today's architect, you have to have an interior room such as this court room where you have no windows—it is just as desirable as it is with windows, is it not? A. Well, I would say that is very definitely a matter of opinion.

To me it is not. I, personally, would rather look out a window.

Q. Do you know the depth of the new Bender Building? A. Well, that building is an L-Shaped building with frontage both on Connecticut and L Street.

Q. How deep is it? A. I do not know.

Q. All right.

Let us go back to our property. What reliance did you place upon the existence of a lease on this parking lot portion of the E Street frontage? A. I took the amount of lease and figured as to how much that would be per square foot.

Q. You capitalized it on the basis of the lease? A. I capitalized it on the basis of the rental.

(215) Q. This was the existing lease, did you consider it? A. No, not now. It was the former lease before it was reduced.

Q. Why, then, didn't you capitalize the adjoining building on the basis of the lease?

(Mr. Liotta) Objection. The lease, I submit, was not on the adjoining building but was on a building that was not there. I might say—

(The Court) The Court does not understand your question.

(Mr. Yochelson) The witness has testified he arrived at a basis of value of the parking lot because he used the lease in existence to capitalize.

(The Court) Yes.

(Mr. Yochelson) I asked him why he did not use the lease which was in existence on the adjoining building as a basis of capitalization.

(The Court) Yes, but the building was not there.

(Mr. Yochelson) True.

(The Court) All right.

(Mr. Yochelson) I think that the witness should be permitted to testify if he can or will, what that would cost to put it there, and so on, if he took these things (215-A) into consideration.

(The Court) Hasn't he already testified?

(Mr. Yochelson) I would like to get from him why he used one approach in one case and not in the other.

(The Court) All right. The witness may answer.

(Mr. Liotta) Your Honor, may I be heard further on this?

(The Court) Yes.

(At the Bench.)

(216) (Mr. Liotta) The question again leads to the fact that counsel is pointing to this lease as an indicia of value of this property. A capitalization of income from a building

that was not in existence, I submit, is counter to Your Honor's pre-trial order. That is exactly what he is going to right now.

The lease is there. We do not deny it is there for the building in the future but now he is getting to indicia of value rather than highest and best use.

(Mr. Yochelson) Your Honor has said this lease is permissible to establish the highest and best use of this building. The highest and best use under the terms of this lease is as an office building which would produce a certain amount of rent. That is what I am getting at.

(Mr. Bernstein) The standard method.

(Mr. Yochelson) This is not an unusual thing.

(Mr. Liotta) Could you—how could you consider its value from a lease binding on the property? That would be artificial.

(217) (The Court) The Court feels that the witness has already testified regarding the lease.

(Mr. Liotta) But he has not testified to what extent he gave consideration or why he used one method in one case and another in the other.

(The Court) He may answer the question.

Now, when he answers it, it may kill your case and that is he is not at all satisfied that that property is worth any \$388,000, and that there is something entirely wrong.

(Mr. Bernstein) It has a binding contract on it. That will come later from Your Honor's ruling.

(The Court) The point is, I am surprised when Mr. Liotta said that the lease could be introduced, because I expected him to show that the government was the only one that could use this property, that there has not been any demand for the property except for the property.

(Mr. Bernstein) Apparently he has abandoned that by something he told us before.

(Mr. Liotta) I have abandoned the objection to the extent of allowing the lease as Your Honor has ruled, and for the purpose of showing its highest and best use. I have not abandoned the thought that (218) the property would be leased only to the government. Only to the extent Your Honor has indicated it would be admissible for the purpose of showing highest and best use.

The witness has testified that in his opinion it did not indicate highest and best use. I respectfully submit the lease that he is talking about was as the property in its present use on the parking lot.

(The Court) We can go off the record. You can ask the question.

(In open court.)

(219) By Mr. Yochelson:

Q. In substance, my question a moment ago was why you considered a lease on this parking area as a basis for determining your value of that portion of the property, and did not consider the existing government lease in determining the value of the improved portion of the E Street property and the building behind it. A. Well, for the simple reason that there was not any building there and I had no way of definitely knowing whether there was ever going to be a building put there or not. I have said over and over again, that I appraised what I found was down there, and I based my valuation principally upon sales, considering the lease on the parking lot was only one method of substantiating or saying whether it was a fair valuation based on sales.

I did not appraise something that was not there.

Q. Is there any question in your mind that this building was going to be there?

(Mr. Liotta) Objection.

(The Court) The Court feels the witness has answered the question.

(Mr. Yochelson) May I ask the witness whether or not he knew that there was a completion bond filed by the owners?

(220) (The Court) All right.

By Mr. Yochelson:

Q. Do you know that?

Did you know that the owners had posted a bond to assure the completion of this building?

(Mr. Liotta) For the record, my objection—

(The Court) Overruled. You can answer. Did you know that?

(The Witness) No, sir.

(The Court) All right. That is the answer.

By Mr. Yochelson:

Q. Would that have made any difference? A. No, sir.

Q. Mr. Throckmorton, if you knew that there was a lease on this building with an extremely low rental would you have taken that into consideration?

(Mr. Liotta) Object.

(The Court) Sustained.

By Mr. Yochelson:

Q. Let us go back again to our property.

You put land value on the E Street portion of 874, less \$80,058, which, in your judgment was the cost of demolition, and you came up with a resulting land value on E Street of \$794,244. Right? (221) A. Yes, sir.

Q. How much is that per foot? A. About \$32 per square foot, roughly.

Q. Mr. Throckmorton, do you think this is the fair market value of that land unimproved today or at the date of taking?

(Mr. Liotta) Objection. The evaluation points to the land as a unit, not as to this parcel.

(The Court) Yes. The objection is sustained. The witness has already testified as to how he valued it.

By Mr. Yochelson:

Q. This evaluation, I take it, assumes that the improvements have no value but that on the contrary, the existence of those improvements is a detriment to it.

(Mr. Liotta) Objection.

(The Court) Sustained.

You are the one that asked the question for him to put it down to per square foot, Mr. Yochelson.

(Mr. Yochelson) Yes, sir.

May I ask you whether or not you think that this property is worth more or less with the building or without it?

(222) (Mr. Liotta) Objection.

(The Court) He may answer.

(The Witness) Yes, sir, I will answer, Mr. Yochelson. I did give some value to the improvements and that is the reason that I arrived at a million one hundred forty thousand dollars. I think the land with the buildings comes out to \$923,000. So, I gave the owners of the property every benefit of the doubt.

By Mr. Yochelson:

Q. 923— A. I did put value on the improvements.

Q. 923,000 is the value of the land. A. Of all the land if vacant.

Q. And the value of the improvements. A. Is the difference between that and your ultimate value that you have testified to.

And I gave a final valuation of \$1,140,000; as it stands.

Q. Do you think this land is worth less than land in the 900 block of F Street? A. Yes, I would say it is worth less.

Q. It has the same zoning, does it not? A. Practically the same zoning, yes.

(223) Q. How much less is it worth than the F Street land? A. I do not know. That would have to be a study of each individual piece of property.

Q. You have not made that kind of study? A. As to that, I have made studies of different properties that I have appraised on all of those streets down there.

Q. You have testified as to the F Street property but you now tell us you cannot tell us the difference because you did not make the study.

Q. I used two of the street properties as near comparable—as near comparable buildings as I could locate anywhere near the subject property. So I did not say that at all.

Q. How does this land compare in value in your judgment with the property at 12th and E? A. I think the 12th and E property has much higher value.

Q. How much higher percentagewise? A. I do not know.

Q. Have you made any effort to determine? A. I would say that considering the corner site, the compact size of it, as an opinion, I would say it is worth double what the E Street property is worth. That is purely an opinion without basing it on a lengthy study and (224) analysis of it.

Q. Couldn't you put the same improvement on this property as you put on the corner of 12th and E Street and get the same return for it?

(Mr. Liotta) Objection.

(The Court) Yes, the objection is sustained.

(Mr. Yochelson) Do I understand that I may not ask him that this property may not be improved similarly with the real property at 12th and E?

(The Witness) Now—

(Mr. Liotta) I submit that was not the question.

(The Court) That was not the question.

(Mr. Yochelson) May I ask it in that way?

By Mr. Yochelson:

Q. Would you improve this property in the same manner as the property at 12th and E property was improved? A. Shall I answer?

(The Court) If you can.

A. There is no question but that you could put an office building on there, Mr. Yochelson. It would not be the same type building that is put on 12th and E.

Q. Couldn't you put the same building that you put at 12th and E—the same building? (225) A. Of course not. You could not put the same building on a parcel 190 feet deep as you could put on a corner property.

Q. How large was the 12th and E Street lot? A. 16,072 square feet.

Q. What were its dimensions? A. I do not think I have it. I do not have the width and depth. It was almost a square piece of property, though.

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(226) AFTERNOON SESSION

1:30 p.m.

(Mr. Yochelson) May we proceed?

(The Court) Yes.

Thereupon

WILLIAM THROCKMORTON

a witness, having been previously sworn, resumed his testimony further as follows:

CROSS EXAMINATION (resumed)

By Mr. Yochelson:

Q. Mr. Throckmorton, some of these sales you used as comparables were sales that were made in the year 1958, 1959 or 1960. What has been the trend of land, real estate land values, in the intervening period? A. Depending, Mr. Yochelson, on the location in the city, with varying degrees.

Some land values generally have increased all over the District of Columbia. But to varying degrees. In some sections of the city they have increased a great deal more than they have in others. There is not any way of determining percentagewise as to how much per year. It is just more a question of judgment and being familiar with the neighborhoods as to what has been the trend.

(227) Q. Is it not a customary appraisal practice to employ your best judgment in bringing these best sales up to date so as to determine what they reflect as to today's market? A. Yes, we always make allowances for the date of the sale.

Q. Do you have any opinion, sir, as to what the percentage of increase in value, let us say, on the property at 900 block of F Street has been between 1961 and the date of taking?

(Mr. Liotta) The witness has just previously answered he did not compute it on the basis of percentage. Objection.

(The Court) Overruled. The witness may answer if he can.

(The Witness) I could not tell you percentagewise how much it has increased. There has been a slight increase in value, as I said, in all land values in the District of Columbia, varying in the locations.

Q. Hasn't it not been more than a slight increase? A. In some sections decidedly so, yes. In other sections, no.

Q. For instance, your sale of the Columbia Theater (228) property, date of sale that you gave us as September

13, 1961, was there an increase between that date and the date of taking in your judgment? A. Did you say '51?

Q. 1961. A. 1961.

Q. Yes. A. Yes, I would say there had been some slight increase in the land values since that time.

Q. Could you give us any estimate at all what you consider the increase has been during that period? A. No, sir.

Q. At any rate, then, that sale price of \$52.17, which was September 1961, a sale at that time, had been increased by January, 1963, is that not right? A. I would say it could have.

Q. Did it or did it not? A. I do not know. I would have to study it to see whether that particular piece of property had increased in value. As I say, each one has to stand on its own bottom. You cannot just take a generality and say it has done or has not done so.

Q. Do, then I understand you did not make such a (229) study? A. On each individual piece of property?

Q. On the sales you considered comparable. A. Naturally, I considered the time that the sale was made up to the date of taking. And did give it consideration, yes, sir.

Q. All right. Now, let us take this sale again. A. Yes.

Q. You gave it consideration. Did you consider that it increased in value between September, 1961 and January, 1963, and if so, to what extent? A. You would have to repeat the last part of your question again. I did not understand the last sentence.

Q. You have testified that you did give consideration to the passage of time and its influence on value. A. Yes.

Q. Right.

You have given us as a comparable a sale on September 13, 1961.

I asked you what the influence was between that date and January 18, 1963? A. I do not know the exact percentage of how much it has increased, Mr. Yochelson.

(230) Q. Did you make any effort at all to determine what this piece of property would have been worth January 18, 1963? A. Just what kind of an effort could I have made to have found that out? There has been no recent sales that have occurred since that time. It is purely a matter of opinion.

Q. I want your opinion. A. I would not know, percentagewise, how much it has increased.

Q. What kind of a study did you make? A. Now, due consideration was given to all of the comparable sales and the date. I have repeated that over and over.

I told you that I did not attempt to break them down percentagewise. No one can do that.

Q. Do not appraisers generally do that? A. No.

Q. Well, one of your comparables was a sale on F Street, a piece of property in 1959. What has been the history of the value of that property between 1959 and 1963? A. I would say that that particular block in there has increased in value to some extent.

(231) Q. To what extent, sir? A. I would not be in a position to answer that percentagewise any more than I could answer the other question.

Q. How then can you compare a sale which is no longer the fair market value with a sale that you are trying to reach today on fair market value? A. I do not know that it is fair market value. It may have increased ten per cent; it may have increased 12.

Q. May it have increased fifty per cent since 1959? A. No, not in that particular block; no, sir.

Q. Do you know that some of the very sales that you gave us have been resold at higher prices? A. Now, what date are you taking those sales?

Q. Prior to— A. The dates that I have given you, Mr. Yochelson, in here, have been prior to the date of taking.

Q. Yes, sir, and this is the only entry I am making is prior to the date of taking. A. Well, if there have been any that I have named in here, that there have been other resales on prior to the date of taking, then it is not a matter of record.

Q. You do not know about it.

(The Court) You can ask him the question.

(Mr. Yochelson) Do you know of anything?

(232) (The Court) No, no. You know, don't you?

(Mr. Yochelson) I have one specific in mind.

(The Court) Ask him the one specific, then.

(Mr. Yochelson) If the Court please, let me first ask him this:

By Mr. Yochelson:

Q. If the Court please, let me first ask him this: Mr. Throckmorton, in determining the date of the sale, what date do you use—the date of the contract or the date of the recordation of the deed? A. Well, the courts have ruled, Mr. Yochelson, that the date of the contract is acceptable. In other words, if the date of the contract is prior to the date of taking, it is acceptable, and even though the recording of the deed does not take place until after the date of the sale, it is still recognized as a sale.

Q. You would recognize the date of the contract, would you? A. If the date of the contract was prior to the date of taking.

Q. Yes, sir. A. Yes.

(233) Q. Did you give us lot 408 in Square 807, that sale; no, lot 807 and 808 in Square 408 improved premises 1313 and 1319 Street Northwest?

(Mr. Liotta) If counsel would give the names of the parties.

(Mr. Yochelson) It is my information it is Riggs National Bank to Herrmann.

(Mr. Liotta) I object to that. May we approach the Bench?

(The Court) Yes.

(234) (At the Bench.)

(Mr. Liotta) I respectfully submit that that sale was made after January 2, 1963 and it was directly across the street from the corner of 9th and D Street, if I recall and it is in direct relationship to Your Honor's orders that no sales after January 2, 1963 shall be admitted in evidence.

I submit my recollection indicates that contract was made somewhere between January 2nd and January 18, 1963.

(Mr. Yochelson) This correspondence was my information that the contract was between January 2nd and January 17. But it is my understanding that the cut-off date was the date of taking which is January 18.

(The Court) January 2nd.

(Mr. Yochelson) All right.

(The Court) You had better tell the jury that it is not pertinent.

(Mr. Yochelson) All right.

(Mr. Liotta) May I request that you instruct the jury at this time as to this cutoff date so they will be clarified as to the reason for it?

(Mr. Yochelson) There has not been any testimony as to value. I have not asked the sale price of it. So the jury has now known because he has not answered it.

(235) (The Court) All right.

(In open court.)

(The Court) Do you withdraw the question?

(Mr. Yochelson) Yes.

(The Court) Then the jury will understand that the question has been withdrawn.

By Mr. Yochelson:

Q. Were you informed, or did you have knowledge that as of the date of taking of this property, there existed a commitment between Woodmen of the World and the owners of the property?

(Mr. Liotta) Your Honor, objection.

(The Court) Overruled.

(The Witness) Yes.

(The Court) Wait just a moment.

Would you come up here, gentlemen?

(236) (At the Bench.)

(The Court) I think the Court will reverse the ruling, and it will reverse its ruling on this basis.

That the Court understood prior to the trial of this case that the lease would be subject to testimony as to whether it was under coercion.

(Mr. Yochelson) We have such testimony we will bring in.

(The Court) Yes, but it is too late.

Now, we are getting to another question whether it is bona fide.

(Mr. Yochelson) They do not question the bona fideness of the government lease.

(The Court) Now, we are going into the Woodmen. It is going to be a moot question.

(Mr. Yochelson) I do not follow Your Honor.

(The Court) This is cross examination.

(Mr. Yochelson) Yes, sir.

(The Court) One of the conditions precedent to the Woodmen's contract—and the burden is on the property owner to establish that this is a bona fide sale to the Woodmen.

(Mr. Yochelson) Yes.

(The Court) Now, we are going to ask this witness if he knew that there was a sale. So it is going to be (237) a moot question at a later time to try to tell the jury.

(Mr. Yochelson) The problem we would have then is this: We are prepared to bring in a representative of Woodmen of the World to establish it was a bona fide transaction. May we then recall this witness for that purpose?

(The Court) Yes, far better than going into it now. That was my point originally, was that we should cross examine this witness on the testimony he gave, and then the burden established by the property holder and then call this man back.

(Mr. Yochelson) We would reserve the right to recall him for cross examination.

(Mr. Liotta) In the event it is found to be admissible.

(Mr. Yochelson) Yes, sir.

(The Court) The Court reserves ruling. The objection is sustained.

(Mr. Yochelson) Very well, Your Honor.

(238) (In open court.)

By Mr. Yochelson:

Q. In reaching your conclusions of value with respect to this property you testified, as I recall, that you employed the three traditional methods used generally by appraisers—namely, the capitalization, market sales, and the land plus the cost of improvements. A. Yes.

Q. In your market sales, market sales data, you considered I think you said, what these people paid for the property as being the most important and heavily weighted evidence of all? A. Yes.

Q. Do you consider that they bought this property at what was then a fair market going value for it? A. I would certainly see no reason to assume otherwise.

Q. That price per foot was how much? A. I think I have already figured that out a couple of times, Mr. Yochelson. They paid a million dollars for it.

Q. And 35,000 feet roughly. A. Yes.

Q. It comes to around \$28 a foot; does it? A. Something like that.

(239) Q. In comparison with sales on 12th and E at \$75 you think \$28 represented fair market value on this property? A. Well, if we are going to name \$75 at 12th and E, we are going back and go over these others that sold anywhere from fifteen to sixteen to twenty dollars a foot.

Q. What sold from \$15 to \$16 to \$18 to \$20? A. Shall I go over those again?

(The Court) Do you think that it is necessary?

(Mr. Yochelson) He has testified there was some that sold for \$15 and \$18 and \$20. I would like to know what they are.

(The Court) All right.

(The Witness) All right, sir.

We will go back to 513—9th Street again, lot 800 and square 406.

By Mr. Yochelson:

Q. What was the date of that sale? A. July 15, 1959.

11,480 square feet. It sold for \$147,500.

Q. Go ahead. A. The figures \$12.84 per square foot.

517—9th Street, sold November 19, 1959, \$100,000 and figures to \$23.71 per square foot.

The above parcels were cleared of an old theater (240) and restaurant building at the cost of approximately \$22,000 and transferred to Lansburg Realty Corporation December 23, 1960.

These parcels total 15,697 square feet, and that in addition an alley, which is numbered Lot 812 consisting of 512 square feet which makes a total of 16,198 square feet total land area. Total cost, including demolition, figures approximately \$269,500 which figures to \$16.83 per square foot.

Q. Those are all sales in the 500 block of 9th Street, which took place about July and around that, of 1959? A. Now those two, yes.

Now, we have two more in the 700 block of 9th Street that run clear through to 8th Street, given two frontages, being lots 830, 832, 805, 807, 828, in square 405.

At 141 feet frontage on 9th Street and 199 feet-plus on 8th Street.

Total area was 30,613 square feet of the parcel. It was sold by the Service Parking, Inc., contract dated December 28, 1962, and executed December 31, 1962.

625,000, or approximately \$41 per square foot—\$21 dollars per square foot, I am sorry.

Q. Was that between May, 1959 and December, 1962 this property was sold twice and the increase was (241) almost 75 per cent?

(Mr. Liotta) Objection.

(The Witness) No.

(The Court) Wait.

By Mr. Yochelson:

Q. Is that true? A. No.

Q. These are two different properties. I am sorry.

(The Court) Then that is withdrawn.

(Mr. Yochelson) Yes, sir.

(The Court) All right.

By Mr. Yochelson:

Q. Does this indicate—you have a sale in 1959 at \$10 and \$12 a foot and a sale in the same block in 1962 at \$20 for—that is \$20.41,—that the trend in that period had gone up that much? A. That the trend has gone up? It was an average. It was an assembly of two properties. That was then averaged out.

Q. What about the sale you gave us at 9th and E Streets, 504 9th Street? This was in May, 1960 and I have \$31.18 a foot, is that right? A. 407 10th Street.

Q. This is 504 9th Street. A. Well, that is part of an assembly. You have left (242) out the preceding sale. It is the northwest corner of 9th and E Streets and consists of three properties: 901 and 903 E Street and 504 9th Street, which are lots 801, 845 and 840 in Square 377, and they were assembled in two transactions, one of them on May 23, 1960 which was 901 and 903 E, which figured to \$20.55 per square foot, including improvements.

Q. Then did you tell us that lot 840 was resold on 10-21-1961 to Lujac, Inc. A. That was all part of the same assembly. It was not resold. It was purchased at that time by Lujac Sept. 21, 1961.

Q. That price was how much? A. \$46,000 which figured \$31.18 per square foot including improvements. A total land area assembled by Lujac was 9223 square feet, and a total purchase price was \$210,000, or an average of \$22.76 per square foot, including improvements, which consisted of three buildings occupied as stores and restaurants. So you have got the benefit of the improvements plus your land value, because these improvements did have some value.

Q. Are these improvements going down? A. They are still in use.

(243) How does this property compare in value with the property at 10th and I, the Star Garage Property—just about half a block away? A. Which are you referring to now—the subject property.

Q. Yes. A. The property being appraised.

Q. Yes. A. We have got a situation there at 10th and E that is somewhat similar to 12th and E, although it is not as good a location as the corner of 12th and E, and the southwest corner of 10th and E is improved by a three story parking garage.

Q. This was a sale in 1958? A. Yes.

Q. For \$47.98 a foot. A. Yes, including improvements.

Q. Yes. A. Which is a modern parking garage.

Q. How much was that—how much has it gone up in value in your opinion between November, 1958 and January, 1963? A. Well, I could not answer that percentagewise. It has increased some in value, yes.

(244) Q. You cannot give any estimate at all? A. I would not attempt to without a study.

Q. But you did study it, did you not? A. You know as well as I do that I took the sale off the records. I considered what was on the property. You have gotten the benefit of the doubt because of the improvements are certainly worth half of the purchase price which would bring the land down to probably in the \$20 range.

Q. All right, then I take it that in this first method approach, the cost of reproduction, you took a land value and did you then add to it what you considered to be the value of the building?

(Mr. Liotta) Objection. The witness has testified these are land sales that confirmed his general value. He did not relate it to reproduction to that extent.

(Mr. Yochelson) The witness has testified that he used all three methods and one of them was the cost of the land plus the improvements.

(The Court) The witness, as the Court understands, Mr. Yochelson, has not testified that he used all three methods on every parcel of property. He has explained that to the jury.

(Mr. Yochelson) This parcel is what I am asking (245) about.

(The Court) All right.

You may answer, Mr. Throckmorton.

(The Witness) I considered all of the different methods of appraisal, Mr. Yochelson, but my final determination of value was based primarily on market data and comparable sales.

By Mr. Yochelson:

Q. Didn't you tell us that you used or employed all three methods? A. Certainly I considered them.

Q. All right. Now, how did you employ this particular method?

(Mr. Liotta) May I note my objection to the inquiry as to the reproduction cost? The witness has testified he gave the consideration to it but his valuation was based on market data. I submit—

(The Court) Overruled. The witness can answer.

(The Witness) All right. We took the E Street parcel, which is the warehouse, 11,436-plus square feet, times eight floors, \$91,495.

By Mr. Yochelson:

Q. You mean square feet, do you not?

(246) You said dollars, do you mean square feet or dollars? A. 91,495 square feet. I am sorry.

Q. All right. A. To that I added a lower level and the basement, 11,436 square feet, giving a gross floor area of 102,932 square feet, at \$8.75 per square foot.

Q. What was—what does \$8.75 represent? A. A figure—that is the reproduction cost.

Q. What does that give you? A. \$900,658, to which I added the penthouse at \$1200 and the vault under the sidewalk of \$5,000, giving a reproduction cost, new, of \$968,508.

Q. Go ahead. A. Less depreciation, 70 per cent, all forms, \$634,801, giving the depreciated value of the improvements of \$272,057.

Add the land as used, at \$20 per square foot, gives a total valuation on the E Street parcel of \$769,859. The warehouse on the alley, 46,851 square feet, at \$8. per square foot, they run \$374,808.

Penthouse 1500, less depreciation of 60 per cent all forms, \$225,785, giving a depreciated value of the (247) alley warehouse, \$150,523.

Add land, 7908 square feet at \$12 per square foot, as used, a total value of the alley parcel improved with warehouse, \$245,425.

Unimproved alley lot 2336 square feet, land at \$18 per square foot, \$42,053, total value, all parcels, estimated by the cost approach, \$1,057,000.

Q. Mr. Throckmorton, do I understand that you value this lot 50, this small parking lot in the alley on which there are no improvements at \$18 a foot, and land under the building at \$12 a foot. A. Yes.

Q. Why? A. As used.

Q. You mean the use of that takes one-third of its value away? A. Yes, a warehouse on there, you could not give the lot value any more than that, if you are going to give the improvements value, too. You cannot do both.

I gave the entire tract \$18 a square foot, if vacant. You asked me that.

Q. \$18 if vacant. A. Yes.

(248) Q. That is the alley property? A. Yes.

Q. Do you think you could build this building for \$8.75 a foot? A. According to one of the foremost contractors in the city, yes, and I took his estimate on what it would cost to do it and accepted that.

Q. Who is that? A. Mr. George Scharf, who is vice president of the Prescott Construction Co. He based his figures on the Hecht Company warehouse which he built out on New York Avenue.

(The Court) Wait. Are you through with the question?

(Mr. Yochelson) Yes, sir.

(The Court) We do not want you to testify what he based it on.

(The Witness) Yes, sir.

(The Court) Will he testify?

(Mr. Liotta) Sir?

(The Court) Will Mr. Scharf testify?

(Mr. Liotta) Yes, I intend to call him on rebuttal.

By Mr. Yochelson:

Q. Your second method of approach was the market sales data, and we have considered the sale to the present owners. Do you consider that their cost on the date (249) of taking was more than the cost of the date of acquisition?

(Mr. Liotta) Objection.

(The Court) I did not follow that.

(Mr. Yochelson) Do you consider that the cost to them as of the date of taking was greater than at the date of acquisition?

(Mr. Liotta) I object; Your Honor's pretrial ruling, that is not a fair value in this case.

(The Court) Objection sustained.

By Mr. Yochelson:

Q. To what extent did you consider these sales of improved property on 14th Street, Kalorama Road, and other areas somewhat removed from the subject property as even being comparable? A. I did not get the meaning of that. I understood the properties you are talking about.

Q. To what extent did you consider those properties, those sales to be comparable to this property? A. As I said yesterday, there were no direct comparable sales. We tried to find buildings as near comparable as could be lo-

cated, that have been sold. There were none in the downtown area, so we had to go. We have been into that already.

(250) Q. Why didn't you go into Arlington or somewhere else removed? A. That does not make much sense.

Q. Did it make sense to go on 14th Street? A. I go on the old Fontaine Tract on Bladensburg Road—

(The Court) Wait a moment. When you testified on Kalorama Road, did you tell the jury that that was only for warehouse?

(The Witness) Yes, sir.

(The Court) Wasn't that your understanding of his testimony?

(Mr. Yochelson) Yes, it was, sir.

(The Witness) Yes, sir.

(The Court) It had nothing to do with the comparable. It was purely warehouse rental.

(Mr. Yochelson) No, it was comparable for his income approach, Your Honor.

(The Court) For warehouse.

(Mr. Yochelson) Yes. He testified he—

(The Court) Let us clarify that part of it.

It is my understanding that the witness' testimony yesterday on the property located away from this property was that it was for warehouse rental.

(Mr. Yochelson) He developed—as I recall his testimony, if the Court please, that he considered some sales (251) so distant, or some distance removed—properties which he considered to be comparable as determining warehouse rentals.

(The Court) Right. That is my understanding of it.

(The Witness) To get at the gross floor area.

(The Court) Yes.

(Mr. Liotta) Pardon me. May I inquire one question? Was that as to rentals only, Mr. Throckmorton?

(The Witness) No, what Mr. Yochelson is talking about now were sales.

(Mr. Yochelson) Then if the Court please—

(The Witness) I did not testify on any rentals until today.

(Mr. Yochelson) I think that the Court and I are both confused.

(The Court) Yes, you can clarify it.

By Mr. Yochelson:

Q. Do I now understand that you considered sales of properties at 14th and T Street and Kalorama Road and certain others which are some miles removed to be comparable sales.

(The Witness) I did not say that.

By Mr. Yochelson:

Q. Well, what did you say with respect to considering them as sales? (252) A. I said that I took what I considered as near comparable as were possible to locate, taking the type of building and what they sold for, to arrive at a gross floor area figure per square foot, to have something to base the floor area on in the subject properties.

Q. Well, then, you did take them as comparable sales?
A. No, I did not say that.

Q. I wish you would help me, because I am lost.

On what basis, how are they comparable. A. They are comparable because, in a sense, they so establish the gross floor area by the sales price as to what you could expect to put on this particular building per floor area.

(Mr. Yochelson) I do not understand that at all.

(The Witness) I did not think you did.

By Mr. Yochelson:

Q. Did you or did you not consider these sales comparable sales? A. Well, now, I do not know what you mean.

Q. What do you mean by "comparable sales"? A. Well, I know what I mean but I do not think that you do, sir. I mean, excuse me—but I don't think you get yet what this gross area means.

(253) Q. Let me see if I can explain what I mean, sir.

In my mind a comparable sale is the sale of another piece of property which compares in such a degree that when we know what the property sold for, it helps us to reach some conclusion of the market value of our property. Is that what you mean, sir? A. I would still say you do not—I do not get your question yet.

Q. Please tell us what your definition of a comparable sale is. A. What do you want now—the warehouses.

Q. No, just what do you mean by comparable sale? A. A comparable sale, Mr. Yochelson, is a sale of land, a building, or what-have-you, that compares in some way as near as possible to the property in question.

Q. How do the properties on 14th and T Street and Kalorama compare with this property? A. Well, we have a building at 14th and T Street, N.W. comprising 10,180 square feet of land improved with a three story warehouse, containing approximately 30,500 square feet of gross building area.

Also adjoining unimproved lot containing 1516 square feet of land. The only similarity of comparison there is a three story building. Whereas our buildings, one is an eight story and one is a six story.

(254) Q. Do you think there is sufficient comparability to help you? A. I have said over and over again that I did not consider any of these exactly comparable. I found something as near comparable as possible.

Q. There is evidence of these sales with respect to the property removed some miles or more—

(The Court) Just a moment.

Mr. Throckmorton, did you testify yesterday that you used that as a comparable on the basis of warehouse?

(The Witness) Only as to arriving at the figure for the gross floor area.

(The Court) Yes, but in the comparison were you not comparing warehouse?

(The Witness) Yes, sir.

(The Court) Now, what about the Kalorama property that you testified to—did you use that as a warehouse comparison?

(The Witness) Yes, sir.

(The Court) That was the question as I understand that Mr. Yochelson first asked you.

(The Witness) Well, that is strictly a warehouse property.

(255) (The Court) And that was the reason that you used those properties?

(The Witness) Yes.

(The Court) Now, does that help, Mr. Yochelson?

(Mr. Yochelson) I do not think so, if the Court please. But let me inquire further.

By Mr. Yochelson:

Q. How were these properties zoned, 14th and T Street and Kalorama Road? A. Kalorama Road is CM-2, 1400 Street, 1400 T Northwest, CM-2.

All of the 14th Street properties are zoned CM-3.

Q. Now, on CM-2 what is the highest building you can build? Would it be helpful if I gave you a copy of the zoning regulations? A. No, I have got it all here, Mr. Yochelson, marked down. If Your Honor will bear with me, please, sir.

(Short pause.)

What is your question?

By Mr. Yochelson:

Q. How high a building can you erect on land zoned CM-2? A. CM-2, a sixty foot height.

(256) Q. How high can you erect one— A. No number of stories—the number of stories you can build is unlimited. You stay within the sixty feet height, medium building—medium bulk commercial height manufacturing.

Q. I just asked about height. You say 60 feet. A. Yes.

Q. How high a building can you put on C-4 zoned property? A. 110 feet, provided the street is wide enough for it.

Q. Our property is C-4, is it not? A. This is C-4, yes.

Q. How high a building can you put on it? A. Well—

(The Court) This jury has heard the testimony, Mr. Yochelson.

(Mr. Yochelson) I think 110 feet is what he said.

(The Court) Yes. Everyone understands that. There is no controversy on it.

(257) By Mr. Yochelson:

Q. What is the floor area ratio of CM-2 property?

(Mr. Liotta) If it will save time, I have no objection to counsel offering that zoning book he has there. I have no objection to it whatsoever.

(The Court) Will that clarify it?

(Mr. Yochelson) I do not think so. The question here is—

(The Court) Mr. Yochelson, I do not think that you now understand that the witness has testified that he is using the property solely for one purpose—and that is for the rental, for storage.

Do you understand?

(Mr. Yochelson) No, Your Honor, I do not.

(The Court) Well, he testified yesterday that the storage would be more beneficial to be all on one floor.

(Mr. Yochelson) Yes.

(The Court) Now, we have a building that is eight stories high.

So, if you think it is relevant, you go ahead.

(Mr. Yochelson) The difficulty is, I do not want (258) to prolong this—but the witness did testify that he used this as comparable.

(The Court) Mr. Yochelson, in fairness to the witness, he has never used comparable. The closest he has ever come, he has said it is near comparable even to the properties that are surrounding the property in question.

(Mr. Yochelson) I took this to mean that he used this as a comparable sale for the property involved in this taking.

(The Court) The Court understands he relied primarily on the sale, itself, and that the others are all near comparables.

(Mr. Yochelson) If they are not comparable sales, they should not be before the jury.

(The Court) The evidence that has been presented has been admitted. I am trying to say that the witness has not said that they are identical. They are as near comparable as he could get, that is what he said.

(Mr. Yochelson) I want to say—well, I will not prolong the argument.

(The Court) Thank you.

(Mr. Yochelson) If the Court please, in line with Mr. Liotta's tender, I would like to offer in evidence the zoning regulations so that then at the proper time I might refer to them.

(259) (The Court) That is fine.

They will be received in evidence.

(The Clerk) Defendant Exhibit 2.

(Defendant Exhibit 2 received in evidence.)

By Mr. Yochelson:

Q. Have you ever appraised any properties for mortgage lending of buildings not yet built? A. Appraised properties where—

Q. For mortgage lending purposes? A. Yes.

Q. In those cases, don't you appraise on the building to be constructed in the future?

(Mr. Liotta) Objection.

(The Court) Did you hear the rest of the question, Mr. Throckmorton?

(The Witness) Yes, sir.

(The Court) On buildings that have not been built.

(The Witness) Yes, sir.

(The Court) Have you appraised on that?

(The Witness) Yes, sir.

(The Court) All right.

By Mr. Yochelson:

Q. Do you not, in such a case, consider the lease? A. Do I not in such a case do what?

(260) Q. Consider the lease, if there is one? A. Well, it would depend again on what kind of a lease it was and who was making the lease and for what length of time—

Q. Now, according to— A. I would like to answer that.

(Short recess.)

By Mr. Yochelson:

Q. You had not completed your answer, I do not believe. A. I do not remember what it was.

Q. The question I addressed to you is whether or not in your appraising for Mortgage Lending, do you not consider the existence of a lease as giving value? A. Yes. As I said, it depends on the maker of the lease, the length of time, the stability of it, and so forth. In some cases decidedly so.

Q. You do not consider the maker of this lease to be unstable today, do you? A. No.

(Mr. Yochelson) No further questions, if the Court please.

(The Court) All right.

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(261) By Mr. Liotta:

Q. In reference to the last question asked you by counsel, do you ever consider a lease as indicating value, if the building has not as yet been erected? A. Well, now, again, that would depend on the type building—the length of the lease.

Q. I am talking about, sir, if the building was not there, a lease on something that was not in existence, do you understand? A. I think so.

May I answer it this way? I think perhaps this would simplify it. If there was a twenty year lease, a fifteen or twenty year lease to a chain store such as Safeway or Sears-Roebuck, or Montgomery Ward, with the stability of the tenant, I would say yes. But for a short-term lease, with contingencies involved, and again depending on the maker, I would say no.

(Mr. Liotta) Nothing further.

ROBERT SAVAGE

DIRECT EXAMINATION

* * * * *

(265) Q. Mr. Savage, were you requested to make an appraisal of that property to determine its fair market value as of January 18, 1963? A. I was.

Q. And have you made such an appraisal, sir? A. I have.

Q. Briefly describe the improvements and the location and the general area of the property.

(The Court) Wait a moment.

When, Mr. Savage, did you make the appraisal?

(The Witness) Just about a year ago. I believe it was in May 1963.

(The Court) All right.

By Mr. Liotta:

Q. Kindly describe the area and the improvements. A. The area that is involved here is in three parcels. The parcel that I am referring to is parcel A and is composed of lots 48, 817, 818 and 836 in Square 378.

Then in the rear of that is a parcel that I will refer to as parcel B, composed of lots E, F, G, H, I, K and 831.

Across the alley from the latter is a parcel which I designate as C, known as Lot 50 in Square 378.

As to the front parcel, the area is 24,891 square feet.

(266) I will not attempt to describe the dimensions because it appears on the plat that has been introduced.

Parcel B, the rear parcel, consists of 7,906 square feet, and parcel C, this lot 50, consists of 2,336 square feet.

Now, as to the improvements at the front, there is an improvement occupying all of lot 48. It is an 8-story and basement brick and reinforced concrete building, that was

erected according to the information I have, about 1897. So it is about sixty-five years old.

The exterior walls are brick. The foundation is brick, and the roof slag.

The floors are relatively open space. They are concrete with a live-load capacity estimated in excess of 100 pounds.

Wiring is typical warehouse type—

(The Court) Wait a moment. When you say 100 pounds that is per what?

(The Witness) Square foot.

(Continuing.)

Lighting—which I mentioned, is rather limited.

Another point that impressed me is that it had just one front window, on each floor, and four windows of wood frame across the back.

(267) The only means of egress and ingress other than a passenger elevator and another freight which was at the back of the building, was a single narrow stair well.

Plumbing was for the first floor lavatory, and oil fired furnace was present. The construction was generally sound.

Now, as to the rear building which covered all of the site, that building I was advised was erected in 1918. It is a newer building than the front one, and it was six stories, of concrete, steel construction and had about half as much again live-load capacity as the front building.

It would be in my judgment in excess of 100—150 pounds.

Now that building was open space, had a freight elevator and an extremely narrow stair well to the upper floors, and a lavatory. The building was heated by an oil-fired steam furnace.

One other point, to go back to the front building, one other point that impressed me a great bit was the frequency of columns that was used in the construction.

Now, lot 50 is unimproved. I think that gives a brief description of the improvements and the property.

(268) By Mr. Liotta:

Q. What was the zoning, sir? A. C-4 of the subject property and of the surrounding area.

Q. Would you describe the neighborhood as you saw it—the general neighborhood of the property. A. Well, I have seen this area in its transition, Mr. Liotta, for sixty-five years, from the time it was more or less a warehouse district until under earlier zoning, it was zoned second commercial, and now under the Louis zoning which went into effect in 1958, it is C-4 zoning.

Early the market was located at 9th and T Avenue—the old Center Market, and there was the Washington Safe Deposit Warehouse on the south side of Pennsylvania Avenue.

McCombers Warehouse on 10th, and then this Merchants Transfer Building. As the market disappeared, this area has been showing a trend to more of a retail use. I do not believe it has yet—real estate men would call that which they do not think has yet arrived.

Q. Now, in reference to your appraisal, would you tell us what method or methods or appraisal you considered to arrive at your valuation of the subject property? A. I used the methods that are suggested and required (269) by the various appraisal societies, and that is, in the process of evaluation, I went into comparative analysis, reproduction analysis and capitalization.

Q. Speaking of capitalization, you are referring, sir, are you, to the improvements as they existed on the date of taking? A. Yes, sir.

Q. In reference to the methods that you used or considered, was there any particular method which you attached the greatest weight to? A. Yes.

I attached the greatest weight to the comparative approach.

Q. Could you explain, briefly, why then, you used or attached the greatest weight to your comparative approach?
A. Well, because of the type of improvements we have here and because I have always been taught that for property that is old property as opposed to a new improved—new improvement, or a new residence, the comparative approach is the soundest, the most accurate.

Q. Now, in reference to the comparable sales that you are going to testify on, did you examine the public records, or do you know of your own knowledge whether there was any evidence of any kind of compulsion, coercion, or (270) compromise, any foreclosures that would make the sale a forced sale or were any of these elements present? A. I have been careful to avoid that. I have my own index which I have kept of every sale and mortgage in the City since 1925.

I attempted to confirm these sales with the owners or the sellers or the purchasers, and I have gone to the record office to see if any additional information could be obtained there.

Q. They were free and open sales so far as you know?
A. So far as I know; yes, sir.

Q. Tell us what sales you considered comparable to the subject property? A. I think the most informative sale that I can mention is the sale of the property itself. It is a comparatively recent sale, for one thing. This property, I will repeat here, they are lots 48, 817, 836, 831, E.F., G, H, I, K and 18 and 50 in Square 378, they were sold March 12, 1962 by the Merchant Transfer & Storage Company to Dicker and Lawrence, Inc. The stamps were \$1,100.

I talked with Mr. Newbold of the Merchants Transfer and he confirmed that the consideration was as my records disclosed, \$1 million.

Now, that property was transferred the same day to Albert P. Dicker, David Lawrence and David H. Fromkin. (271) Now, this is an inside property of a large area as I have stated, some 24,000 feet.

When I went out for comparables, went out on my search for comparables, I tried to find something of similar area in as near a neighborhood as I could find, and of similar size. You do not find replicas hardly ever. But you do find comparables that through a credit and debit system, you can reach a pretty sound conclusion.

Now, the next sale that I looked into, having that in mind, is relatively small, but I did this in building up my background.

Lots 54 and 808, in Square 378, that is this same square, and it is an area of about 5500 square feet. 5,343 to be exact.

I have it here. It was sold November 17, 1960 by Edward Stead, and others to George A. C. Gogos, and others.

On the site there were two old buildings. I am familiar with the consideration and can give it if permitted.

May I give it, Your Honor?

(The Court) Yes.

(The Witness) The consideration was \$79,225. That is about \$14.82 per square foot, including buildings.

Now, that property was resold on April 27, 1962, two years later, to Sylvan Herrmann and others, for a consideration of 190,000—almost double the first consideration (272) or over double, which is \$35.55 per foot, including improvements.

It worked out according to my valuations, to about \$30 per foot for the ground and the balance allotted to improvements.

Now, confining myself again to this square 378, I looked into the sale of lot 805, which it premises 933 D Street, Northwest.

(Mr. Liotta) Let me ask you this first: How did that sale compare with the subject property—The Herrmann sale, or the second sale? How did you compare it with the subject property?

(The Witness) Oh, first, I recognized that it was a smaller area, and secondly, that it was not as deep a site, but I thought that it gave a pretty good indication for analysis.

By Mr. Liotta:

Q. Now, go to your next sale? A. I went to this lot 805, that happens to be along there, that is a long lot, and I was interested in that.

Q. Point your sales out on that map, if you will, as you are talking. A. These that I have given, Mr. Liotta, appear on the plat here. I would think that would suffice. I would think the location is obvious.

(273) Q. All right. A. This lot 805 contains 4,428 square feet and it had a three story warehouse on it. It was sold January 10, 1963 by Mr. Robert S. Nash and others.

Q. What was the date of that, sir? A. January 10, 1963.

Q. I would ask you not to include that, please, in your sales. Was there a contract dated prior to January 10, 1963? A. Yes, sir.

Q. What was the date of the contract? A. Much earlier than that. I talked to Mr. Nash about it.

Q. The contract was prior to 1963? A. Yes, sir.

Q. Did you check that with Mr. Nash? A. Yes.

(The Court) Wait a minute.

You will understand, gentlemen, that we are concerned with the date of notice as well as the date of taking, and the two dates are January 2 and January 18, 1963.

Now, Mr. Savage has just testified that the date of sale, that is, the contract for the sale of the property, is before January 2, 1963.

(274) (The Witness) Yes, sir.

(The Court) All right.

(The Witness) Mr. Nash is a very knowledgeable real estate broker or investor. I know him intimately. He sold this property for \$100,000. Revenue stamps confirmed that, of \$110. The D. C. Transfer tax was \$500, which was further confirmation.

On the site there was a three-story warehouse. This consideration works out at \$22.58 per foot, including the improvements.

Now, I will give another with which or of which I had knowledge, and that is Lot 800 in Square 406.

You probably know that better as the Old Gayety Theater on 9th Street.

Q. What was the address of that property?

(The Court) Wait a moment. Is that a reflection on the jury, Mr. Savage?

(The Witness) No, Your Honor. I think all of us who were raised here know about it, though.

(Mr. Yochelson) Some have even been in it.

(The Court) As well as the counsel.

(Mr. Liotta) I plead guilty, Your Honor.

(The Witness) That is 513 9th Street where that property is located. It ran through from 9th Street to 8th.

(275) I knew about it because a majority of the stock in the holding company which was the Washington Theater, was held by Dr. Charles Stanley White, one of my clients.

He sold it to Ruth E. Angelo, who was a straw purchaser.

The site contained 11,480 square feet. The consideration was \$147,500, or \$12.84 a foot.

By Mr. Liotta:

Q. What was the date of that sale?

(Mr. Yochelson) Give the date.

(The Witness) 6-22-59.

That property was transferred on July 14, 1959 to Lansburg's. They are using it for a parking lot.

By Mr. Liotta:

Q. What was the consideration to Lansburg's. A. Angelo was a straw party for Lansburg's. The same consideration.

Q. All right. A. Then another landmark was what was known as the old Rialto Theater, that used to stand on 9th Street between G and H. The east side. It has been torn down for some time and used as a parking lot. That site at 719 9th Street contained 30,613 square feet. It ran through from street to street. It was sold on March 28, 1963—transferred—

(Mr. Yochelson) 1963?

(276) (The Witness) March 28, 1963, it was transferred by the Service Parking Company to Jack Geller, Norman H. Himelfarb and others. I was careful to talk to Mr. Himelfarb. I looked at the contract and it was dated prior to the date of taking.

By Mr. Liotta:

Q. Was it dated prior to January 2, 1963? A. Yes.

Q. The approximate date? A. December 13, 1962.

Now, that property was sold for \$575,500. I beg pardon. \$625,000 which works out about \$20.41 a foot.

\$575,500 that I mentioned, was over a trust of \$49,575.43, which took up or would make up this \$625,000.

Now, I think this is informative, also. I picked up a sale of lots 829 and 849 in Square 276, the address being 620 E Street. That is on the south side of E, between 6th and 7th. It was sold September 21, 1961, by Lena Mc-Innis, to Nora B. Brokaw, who is the wife of a real estate investor here.

\$10,239 square feet in that transaction. The site was 187 feet in depth. About the same as that with which we

are confronted here. It was sold, I think I gave the date, September 21, 1961, for \$92,000 or \$9 a foot.

(277) On May 22, 1962, the Brokaws purchased the adjacent lot, lot 812 in square 457, premises 622 E Street, Northwest, from C. Martin Brand. There were 3,242 square feet and improvements which they bought for \$68,500 or \$21 per foot.

Now, to then go back on a somewhat different angle, I will take some corners. Corners are generally considered more valuable than inside sites, and I wanted for my own information, to see about these sales. Take the northwest corner of 9th and E, known as lots 801 and 845 in Square 377. It is 901 E Street, south of off to an angle from the subject property.

That corner of 7,299 square feet—and old improvements which were presently there and rented, sold May 13, 1960 by Jerome B. Mills, who had a sports goods store there at one time, to Louis Zions, a real estate man, for \$150,000, or \$20.55 a foot.

By Mr. Liotta:

Q. The date? A. May 13, 1960.

There is the sale of the Evening Star garage on the southwest corner of 10th and E Street, known as Lots 13, 14, 15, 816 and 815 in Square 348. It was sold in October, 1958. October 30, 1958 by the Evening Star to (278) Dorothy Mathews, who was a straw for Mr. Ned Board, and several other investors, and the site contained 17,714 square feet and a modern parking garage.

These investors paid \$850,000 for the property and, allowing a reasonable valuation for the improvement, I think that works out by a residual method to about \$35.00 per foot for the corner.

Now, I go up 9th Street to the Southwest corner of 9th and I know it as Grant Street. I think they call it G Place now. It is lot 813 in Square 375. That was sold 11-15-62 by Richard P. Cope, who is a trustee, holding title to nearly all of Benjamin A. Friedman's properties.

There was sold to Dorothy Mathews—a straw for some investors, containing 12,850 square feet and had a gas station pump on it which is somewhat incidental, but used mostly for parking. It was sold for \$300,000 on November 15, 1962, which is \$23.34 square foot. That is confirmed by D. C. Transfer tax of \$1500.

Now, as to corners, I could also turn to a nearby sale, the northwest corner of 12th and E. That is lots 1, 800 828 to 832 in Square 290.

That was sold on January 1, 1962 by a young man—Christian Heurich, Jr., to Charles Smith, who immediately undertook to erect an office building on it. It was 16,072 square feet.

(279) The consideration was \$1,200,000, or \$74.66 a foot.

I could go on and give corners all around the neighborhood.

By Mr. Liotta:

Q. How did that northwest corner of 12th and E, how did you compare that with the subject property? A. I think there is very little relation or comparability to the subject property. It is just a sale that I knew. As I say, I could go on up and give the corner of 17 and I, or the Rochambeau or something like that.

It is just something I knew of and I thought I would mention it. But it is not as comparable by any means as the others that I have previously given.

Q. All right. A. We have involved here—and I think I should cover this—some back property. I tried to cover it in my comparable studies the best I could.

Now, up on Grant Place or G Place, at 932, which is lot 77 in Square 375, I was appointed by the Court to appraise that in some sale, and I knew about that.

I had another sale in the rear of 449 K Street Northwest, lot 132 in Square 515. That was sold in March of 1962 by Jacob H. Gichner, to Arlene Hesse, who (280) was a straw for Bernstein.

6,168 square feet and a one-story house, sold for \$76,500, or \$10.78 a foot.

(The Court) Where did you say that was?

(The Witness) That is the rear, Your Honor, of 449 K, N.W. in the rear of the old Center Market there at 5th and K.

(The Court) That was no frontage?

(The Witness) No, I gave that, Your Honor, because of these alley lots that are involved here.

I think that is a pretty representative group of things that I investigated. I have made notes of them to come here, because I consider them the most informative of a very broad study that I have made.

By Mr. Liotta:

Q. Then as a result of your examination of the market conditions as you have described, did that indicate to you the value of the subject property? A. I think so.

Q. What did that indicate in your opinion was the value of the subject property as of the date of taking in this case? A. Well, entirely from the comparative analysis standpoint, I think it indicates a value of this property of \$1,311,750.

(281) I think to understand that, we should break it down, now.

Q. All right. A. In my conclusions I placed a value of \$1,010,750 on the front portion. I placed a value of \$276,000 on this parcel B, lots E to K and so forth, and \$35,000 on the value of lot 50 which I have indicated as parcel C.

Q. Have you determined what the \$1,010,170 would indicate as far as square foot value on the front? A. \$1,010,750.

No, I do not have it. It would be roughly about \$40 a foot I think.

(Mr. Yochelson) I did not hear that.

(The Witness) I think around \$40 a foot, Mr. Yochelson.

By Mr. Liotta:

Q. What would that be in the rear? A. For the rear property this parcel B, I can tell you this, I worked out the ground at \$15 a foot and the balance on the improvement. So, if you are looking for an overall figure, I imagine it would come up somewhere around \$28.00 a foot.

(282) Now, for lot 50, which is unimproved, there is no question about that. That is \$15 per square foot.

By Mr. Liotta:

Q. All right.

You had indicated you had considered other methods of appraisal. A. Yes, sir.

Q. And what were they again, sir. A. Pardon me?

Q. What were they again? A. The second approach that I used on this building, you can call it what you will—either summation or reproduction, both terms are used.

Q. What weight did you give to that? A. It was a form of verification of the soundness of the comparative approach.

Q. Proceed. A. Do you want me to go ahead with this?

Q. Yes, sir. A. Well, the first stage in a reproduction summation approach is the determination of ground value.

Q. Excuse me. In reference to this approach, was this approach utilized by you as a check on your market data approach? (283) A. Yes, sir.

Q. Are you ready to testify to that in the event you are called on to do so as to your reproduction cost approach? A. As to what I found here?

Q. Yes. A. Yes, sir.

Q. I thought perhaps we could save time. All right. Go ahead. A. As I say, the first stage in any reproduction

analysis is the determination of ground value. And your ground value is determined from a comparative analysis which I have gone over and which was based on these sales that I have given.

You take all of that material and I have to analyze it from my experience.

Now, respecting those sales, or reflecting on those sales January 18, 1963, it is my conclusion the front site, composed of lots 48, 817, 818 and 836, had a basic ground value of \$30 per foot or \$746,730.

Now, then an analysis of the back sales that I have been able to find, it was my conclusion that the rear site, these lots E to K and so forth, had a value of \$15 per square foot, and the value of Lot 50 was \$15 a foot, or (284) \$35,000.

I went through this improvement on lot 48, as I pointed out. I found the columns in the building, the other factors about it. I made cubic estimates of the area, and I reached the conclusion that to reproduce the building new—and I referred to the standard references of Dow Indexes and Beck's, that it would cost perhaps today 80 cents per cube to reproduce that building new, which would be \$867,615. But, obviously, there is a lot of obsolescence and depreciation in the building; just mentioning some of those factors as physical deterioration and the fact that they are of wood frame windows, as physical deterioration which cannot be cured.

It is what we term "incurable." The non-economical life for such building is generally fifty years. But here we have a building and there is no question but that she is 65 years old.

Suppose you are liberal and estimate the building as having a normal economic life of 50 years, you consider it has a remainder of 25 years. You take off 50 per cent depreciation which is \$425,800—\$425,880.

This functional obsolescence that is curable like modernization of the elevators and so forth, that is functional obsolescence in the number of columns that are in

the case and there is economic obsolescence for warehouse through the transition in the neighborhood for (285) storage purposes.

These big tractor-trailer trucks find it difficult to get into something of this type and a storage up and down and a high building is high. This very firm, Richards Transfer, pulled out and went down to a two story building in Southwest.

For those various factors, I depreciated the building and the total of the depreciation and obsolescence is \$552,568.

It leaves a depreciated value of the front building of \$305,049. That would give a combined—that is a total of ground and depreciated value of the building—combined valuation of the front of \$1,051,779.

Now, going to the rear building. The rear building has a cubic area of something like 570,392 feet. Plus a little appendage on the back of it that brings it up to around \$570,712.

Going back to the same references which is Beck and Dow Indexes, known as the Dow Indexes, I think it would cost for this building just about the same rate per foot as for the front building which would be 80 a cube or \$459,569. Its highest and best use I think is for storage purposes.

Now, there is physical deterioration in this building. I noticed a severe crack in one corner, it is a (286) northeast corner of the building. I think the extent of it would certainly justify a \$10,000 cost.

This physical deterioration, the present age of the building is about 45 years. It is well built and I think that, if you set it up in fifty, a normal economic life at 50, that would be about correct, that would justify 50 per cent, or \$288,248.

Here again we have window troubles. Some of the windows had been closed up but I think would have been better left open.

We had just one elevator in it, a big commercial type elevator.

Lavatories, no office, and the stairway facilities impressed me, as they were extremely narrow. I think normally they would have to be corrected. I put it down as a functional obsolescence.

Then here again there is the transition in the neighborhood over the past few years. I total up 288,000, roughly, depreciation or 63 per cent, which leaves a value of the building \$168,505.

If you here add to that the value of \$15 per foot that I put on the land, you come up with a total in round figures of \$287,000.

Now, as to lot 50, I will say again I put \$15 (287) a foot on that, which is \$35,000.

Now, the total for that cost approach—and I will have to total that now, it is \$1,373,779.

Q. Does that complete that approach, sir? A. Yes.

Q. Do you care to go into the capitalization approach and improvements as existed? A. Do you want me to go ahead with capitalization?

Q. Yes, sir, if you would. A. As to the capitalization of this building, using that for storage purposes of various types, or using it for discount house sales or something of that nature, I went into a number of studies. I have leased not too long ago a large warehouse. I have appraised them, had many discussions regarding them. I talked with Mr. Newbold about the production possibilities of this building. The front building has an estimated 98,451 gross square foot storage space.

Rented at 40 cents per foot gross, it would go obviously a little higher, if you tried to get it down on a net basis; the production would be \$39,380.

Further, in connection with the front site, you have 13,453 square feet in the side lots that are used for parking.

I knew what they had rented for. I rent the man who (288) had the space a place myself. I estimated the value of this lot which would take roughly 112 cars, at \$15 a foot.

\$20,160. That would give a total income, an estimate income for the front, of \$59,540.

Now, from that you have to deduct estimated expense. I have deducted taxes, insurance and repairs. I think that I have very conservative, \$13,472. So that would leave a net before depreciation of \$46,068.

Now, just on the basic ground value, I have placed \$30 per foot and that would equal \$746,730.

So, your required land earnings would be \$746,730 at 6 per cent. That is the prevailing normal capitalization rate of ground in this area anyway. That is forty-four thousand eight hundred and three dollars.

Now, if we subtract that from the net, you have a net imputable to the building, \$1,265. Now, you find through experience what these buildings are usually capitalized at. It is my thought that 10 per cent is customary. You can break it down to 7 per cent for ground and 3 per cent depreciation which would be the same as saying a 33 year life for the building, or you can break it down to 6 and 4 which would be a 25 year remaining life (289) for the building.

So, it would give a building value of \$126,500.

Now, you add back your land. That gives you a total value for the front of this proposition of \$873,230.

Now, going to the back, 43,650 square feet, and because it is in an alley, reduced the rental somewhat, to 35 cents, which is \$15,277. Here I took off a vacancy and collection loss of \$763, leaving an effective gross of \$14,514.

For expense, I take off taxes, insurance and repairs of \$5,187. That leaves a net before depreciation of \$9,327.

The land earnings, \$110,590 at 6 per cent is \$7,115.

It leaves a net imputable of \$2,112 to the building.

Here I capitalized the income because it is an alley situation, at 12 per cent. I think that is what an average prudent investor would require. That would be \$184,333. You add back your land and you get a value for your back building of \$302,923.

Now, on this lot 50, with 2,336 square feet, it will accommodate about 19 cars. I estimate 12 and a half cars. The effective gross would be \$2850. Deductions of (290) \$434.50 would leave a net of \$2,415.50. Your required land earnings for alley property confirms a \$35,000 valuation for it.

If you add those together, you come up with a total valuation of \$1,211,173. So you have, just in review, you have a comparative valuation of \$1,311,750. You have a reproduction estimate of value of \$1,373,779.

You have a capitalization of \$1,211,153.

Now, the problem of the appraiser when you have that situation is to determine which of the three is most applicable to the subject situation. Normally we find the capitalized income is low, and it has obviously variables in it.

One per cent of capitalization makes a difference. Normally, in these old buildings, where you have to select the rate of reproduction, you have to select or determine the problem of depreciation and obsolescence, you usually wind up with the reproduction figure the highest of your approaches.

I thought over the problems involved just as carefully as I could and I reached the conclusion that the value on January 18, 1963 of these properties—the front parcel is \$1,050,000; parcel B, the rear building, is \$287,000 and this lot 50, at \$35,000. A total of (291) \$1,372,000. That is my conclusion.

Q. What did you consider was the highest and best use of the subject property as of the date of taking in this case. A. I think I have stated, Mr. Liotta, that I have seen the transition of this area for 65 years, and I think that it is improving. It is not yet ripe for a large building

on it. You would not want to put anything but a large building on it to get the plottage value out of the site. I think that it should be looked upon today, the highest and best use, which is the most profitable likely use of a site, I think it should be looked upon as investment property, carry these buildings along as so-called taxpayers until the area has gone further ahead. Or, you might use it for some bus terminal or the sale of discount wares in this building. The back building can be used as I have stated for warehouse purposes, for heavy printing, or something of that nature. I think that covers my view of it.

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(292) CROSS EXAMINATION

By Mr. Yochelson:

Q. Mr. Savage, you appraised this property as of January 18, 1963. A. Yes.

Q. On January 18, 1963, when this was appraised, was this a rented or an unrented property?

(Mr. Liotta) Objection. He is referring to this property—government lease, I believe. If he could make his question clearer, I would appreciate it.

(Mr. Yochelson) The question is clear.

(The Court) Let us just repeat it and let us see.

By Mr. Yochelson:

Q. On January 18, 1963, was this property subject to a lease? A. Was it subject to a lease?

Q. Yes, sir. A. I understand it was. The buildings were vacant.

Q. Excuse me.

What kind of a lease did you understand it was subject to? (293) A. I heard it was subject to a lease to the government, if and when it was renovated and remodeled.

Q. You say you heard. A. I saw the lease. I heard it also.

Q. You knew there was a lease, did you not? A. Yes, sir.

Q. In light of that lease, would you not consider that the highest and best use for this property at that time was for office building space? A. No. You had one likely prospect, the government; but I still—from my experience and my judgment, did not consider the office building the highest and best use.

Q. You mean we had 'one likely prospect,'—what did you mean? A. Just that. The United States Government.

Q. It was not a prospect, was it? A. If you want to say 'tenant,' that is all right.

Q. It was a firm lease, was it not? A. That is all right. Yes, it was.

Q. You did not consider this firm lease on this property that it was a rented property? A. I saw the lease.

(294) Q. To what extent, in your opinion, did this lease give added value to the property?

(Mr. Liotta) It is beyond the scope of your Honor's ruling.

(The Court) Objection sustained.

By Mr. Yochelson:

Q. Was this property, the same in all respects on January 18, 1963, as it was when the owners purchased it? A. Not entirely. The purchasers had pulled out lavatories. They had pulled out the heating plant. They had some reinforcing rods delivered on the job. They had pulled out the elevators and they had gone in, to some degree, of clearing the building.

Q. What was that word, sir? A. Clearing the building.

Q. For what purpose—do you know? A. They obviously proposed to do something else with the building—remodel it.

Q. Did you appraise this property, Mr. Savage, as though there were no government lease on it?

(Mr. Liotta) Object. Again counsel is going beyond Your Honor's ruling. He is going to value.

(The Court) Overruled.

(295) It is overruled on the highest and best use basis.

By Mr. Yochelson:

Q. Answer the question. A. May I have it again?

(The Court) Do you want it repeated?

By Mr. Yochelson:

Q. Did you appraise this property as though there were no government lease on it? A. I considered the government lease. But the valuations that I have been giving you are on the property entirely as I found the building. The Government lease was on contingencies and I was asked to appraise what I saw there. So that I think that is a clear answer.

Q. You were asked to appraise it as though there were no government lease? A. No, I was not asked to do it. I did it on my own.

(Mr. Yochelson) Move that all of the testimony of the witness be stricken.

(The Court) Denied.

By Mr. Yochelson:

Q. I understand from your last answer 'on your own accord,' you appraised this property as though there were no government lease. (296) A. I appraised it at what I thought was its highest and best use.

Q. Notwithstanding the fact that there was a government lease. A. I was aware of the government lease. I went through what you call mental gymnastics on it and in analyzing this, I got right back to the fact that there were contingencies involved.

Q. What were they? A. Well, the building had to be completely rebuilt, and you had—I had the whole set of plans, Mr. Yochelson, and I have seen those.

Elevators had to be put in it, it had to be air conditioned, the ceilings had to be dropped. The floors had to be tiled and you had to have a bridge where one building—from one building to the other.

The thing that stood out in my mind more than any other thing was that at least one half of this proposed contingent office building was back in an alley, and I asked myself, 'Where in the City of Washington is there an office building in an alley?'

Q. The government rented this one in the alley? A. I know the government rented it.

Q. You did not consider that as an element in giving (297) value to the property?

(Mr. Liotta) Objection.

(The Court) Sustained.

By Mr. Yochelson:

Q. You say you saw the plans. A. Yes.

Q. They called for what work? A. They called for a great deal of work. I still have the plans.

Q. With what ultimate purpose? A. To remodel the building into an office building.

Q. Do you know whether or not these plans had been approved by the district building? A. I went into that. I think they were. You still had a building though, and I was making that decision.

Q. Sir? A. You still had a building and I was making that decision that had columns all through and you had a building that the base building was 65 years old, you had a building with one-half of the back in an alley and I could not get away from that.

Q. Wasn't this building sound, substantially? A. I do not think in an overall answer to that, well, that it was. I do not think it was economically sound. (298) You had just the government as a likely tenant.

Q. Why do you use the word 'likely?' A. I will leave it out, if you do not like it.

Q. I don't. A. You had the government as a tenant. But I do not think the neighborhood, outside of the government occupancy, has arrived for office buildings. You know Washington well enough to know that the trend for office buildings has been in the other direction. It is just beginning to move back here.

My point is that it has not yet reached that point except for the government occupancy of this building.

Q. The government lease took this building with the columns in as it was, did it not? A. Yes.

Q. And the government lease took this building in the alley? A. Yes.

Q. The government lease provided for the owners a rental such as was encompassed within the lease, did it not? A. But you had to spend a lot of money to get it, Mr. Yochelson.

Q. Did you calculate how much had to be spent?

(Mr. Liotta) Objection.

(The Court) Sustained.

(299) (At the Bench)

(Mr. Yochelson) Your Honor, it seems to me that the very purpose of this is to test the validity and the credibility of the testimony of this witness. He has said, he wants the jury to believe that you cannot give value to this lease because certain work has to be done.

(The Court) Yes. You see, Mr. Yochelson, my problem is this: This is a five-year lease.

(Mr. Yochelson) That is a long lease for an office building.

(The Court) I am talking about the fact that it is a five year lease.

Now, you are talking about that as if it were for the lifetime of the building.

(Mr. Yochelson) Your Honor, in most offices you do not have long term leases.

(The Court) I know it.

He is saying this is not a suitable place for an office building.

(Mr. Bernstein) This is not—Whether or not five years is long enough to give the value is a matter of opinion that does not make it inadmissible.

(The Court) As I see it, you are the one that is going to try to introduce it.

(300) (Mr. Bernstein) This is not cross examining his credibility.

(The Court) Yes, but if we had it to do over again, obviously, you see, I would have you go first.

Now, you said—

(Mr. Yochelson) This has been established for many years.

(The Court) You said in the Chambers before this case started—now, the problem that I have here or that I am confronted with is that you are cross examining on facts that I do not know whether they will be ultimately received or not.

(Mr. Yochelson) He gave the value of two properties. On two properties that he gave the value, predicated on that knowledge. He has never said he is capable of giving those. This is just another estimate.

(Mr. Liotta) I submit, sir, that what they are talking about is two different things. This is based specifically on government need.

(The Court) You see, in this the highest and best use is our problem, is it not?

(Mr. Bernstein) Surely. But this is testing the credibility of an appraiser.

(Mr. Yochelson) He says that the highest and (301) best use is not as an office building.

(The Court) Right.

You are saying to him now, 'Do you know how much it will cost to build the building?'

(Mr. Bernstein) We want to find out now what his reasons are. We have to test his credibility about his reasons. This comes under credibility.

(The Court) You can have the exception. It will go on the record.

(302) (In Open Court)

By Mr. Yochelson:

Q. Mr. Savage, on January 18, 1963, the date of your appraisal, would not an investor have paid materially more for this property than they would without the existence of this lease?

(Mr. Liotta) Objection. Again they are using this lease as an indicia of valuation and I submit that is contrary to your Honor's ruling.

(The Court) Sustained.

By Mr. Yochelson:

Q. What elements would a prudent investor have considered January 18, 1963, in determining what he would pay for this property? A. He would primarily have in mind passing on this, the basic ground value, and it seems to me that it is to your advantage to look at that that way, in that you have a plottage assembly here at the front.

On this back building I have recognized and have appraised with the thought that there is some utilization for the back building as it exists, not in any other way.

Q. It then goes, I suppose, or reduces itself to this, that you did not consider this government lease as being of

value because you did not consider the building (303) to be an appropriate one?

(Mr. Liotta) Objection on the same basis as before. He is using this question as an indicia of value.

(The Court) Don't we understand that, Mr. Yochelson?

(Mr. Yochelson) I am sorry, I do not.

(The Court) The lease has been introduced solely for the purpose of showing the highest and best use.

(Mr. Yochelson) Yes.

(The Court) Now, it is uncontroverted that the property owner has the burden of showing that.

(Mr. Yochelson) I think the property owner has the burden ultimately of proving the fair market value.

(The Court) Yes, just compensation.

(Mr. Yochelson) But that should not limit us from examining the witness.

(The Court) The important factor is that the same question has been asked as to value. Now, the lease has been introduced to show that so far as the property owner is concerned, he considers that the highest and best use of the property on January 18 is that it could be used for an office building.

(Mr. Yochelson) I think so. I think that it is introduced not only for that but to show (1) that it can be used for an office building; (2) that the Government (304) of the United States was willing to rent it as an office building.

(The Court) For five years.

(Mr. Yochelson) Yes, with an option to renew for whatever the lease provides.

(3) That the Government of the United States as an office building would pay \$380,000 a year for the use of the building. I think we should be permitted to ask the witness on cross examination if, in his judgment, this would lend value to the property.

(Mr. Liotta) I submit that is where my objection comes in. They are attempting to use the lease as an indicia of value rather than the highest and best use. The lease has been admitted.

(The Court) Objection sustained.

By Mr. Yochelson:

Q. You have testified that in your judgment the owner is entitled to a certain increment in the determination of the value of this property by reason of its plottage value.

What do you mean by that?

A. Well, when I arrived at \$30 a foot as a basic land value, it was with realization that you had 24,000 feet assembled here in a site that was some 112 feet frontage by, I think it was 187 feet in depth.

(305) To me that assembly is worth more per foot than if I had been asked to go down and appraise one time lot 817 and lot 818 by itself and lot 48 at another time by itself. I think that that is basically sound.

Q. It is your belief, then, sir, that because there is 24,000 plus square feet, it has increased value over a much smaller property? A. Yes.

That is why I started out to give these larger sales, and to try and draw my contrast with the sales of a larger area as I could find. I think that that is an advantage that this owner has.

Q. For instance, what we have—well, lot 817 has only 5400, 5470 feet in it by itself.

How much less would 817 be worth, standing by itself, than the three lots would be worth? A. There is substantially less than \$30 a foot, I know that. I ran that off on a calculating machine. My recollection is that I put something like a ten per cent benefit because of the plottage value.

In other words, I would say it is worth \$27 a foot for the individual lots, forgetting about these dog legs—not dog legs these breaks that are in it.

The I went to \$30 a foot basic value for including plottage value.

(306) Then when I had the value of the building on 48, I come up to a value along the front there of about \$42.18 a foot.

Q. With improvements. A. Yes.

Q. Without improvements, you are at \$30 a foot. A. Yes.

Q. I think the first sale you gave us was the sale of lot 54 in 808 in this same square, the sale to Mr. Herrmann, I think. A. Yes.

Q. You have a total area in those two lots of 5343 feet, do you not? A. Yes.

Q. And the sale price you gave us was \$35.55. A. Including improvements.

Q. Correct.

Why, then, aren't we entitled to 10 per cent above that per plottage value? A. You are getting at this time that value.

Q. In what way are we getting it? A. I put \$30 a foot overall on the site, including building, then you come up to \$42—some odd cents.

Here, including the building, it was \$35.55, and by a residual giving some value to the improvements, you get down to \$30 a foot and I think if you want to (307) pursue that, that certainly 10th Street is better than E Street.

I think these lots were 101 feet in depth and are worth more per foot than your site, even with plottage value, carrying 187 feet in depth. I think those facts are something to think out.

Q. Why is 10th Street worth more than E? A. I think a north-south street is. I have been all over this area, discussing what block is the most suitable, which side of the street. I am one of the panel advising the Assessor's office on downtown values.

(The Court) Wait just a moment.

We do not want that.

We are not concerned with that.

By Mr. Yochelson:

Q. Tell us why you think 10th Street is better than E.
A. Because it is a north-south and takes traffic off the buildings to the north and south.

Q. E Street has the new 12th and E Building. E Street has PEPCO. E Street has Perpetual. Do you think that that lends value to E Street? A. Not if I was buying it.

Q. What new buildings are there on 10th Street? A. None right now.

Q. Mr. Savage, you are not appraising this property (308) as though the market was still there, are you? A. No, sir.

Q. Isn't this lot or the front lot on E Street, the combination of three lots, susceptible to the same use as Mr. Smith made at the corner of 12th and E? A. Or if you wanted to pioneer, yes.

I still do not say that the time is right for it. In think Mr. Smith's building is an element in advancing the section. That is my whole contention.

Q. Hasn't the trend been east as well as west in this area? Don't they have new buildings east of here as far as Indiana Avenue, 4th Street, and 6th?

(Mr. Liotta) Your Honor—in reference to the property on Indiana Avenue, I submit that it is my understanding that that property was built or started construction sometime after the date of taking or the date of announcement of this project.

(The Court) Are you objecting?

(Mr. Liotta) Yes, sir.

(The Court) That is overruled unless that is shown.

You have nothing specific in mind do you?

(Mr. Yochelson) No. I only want to prove that there is a trend eastward.

(309) (The Court) Yes, but not specific.

(Mr. Yochelson) No, sir.

(The Witness) I agree with that, Mr. Yochelson. I think the possibilities of this property to the east are more encouraging, are becoming more encouraging. There has been a new building erected in the 1300 block K Street, as you know, Mr. Yochelson. And there has been another one erected at the corner of 12th and K.

You have this Smith Building at 12th and E. I am asked that question often, and I think it is showing a little more encouragement.

(The Court) Would you come up here?

(310) (At the Bench)

(The Court) We are going to stop. This will be on the record. We will stop in a few minutes. There is only one point I would like you to bring out with Mr. Savage, which I do not understand too clearly.

He seems to take some of his comparables in alleys. But the people that he is talking about do not own the frontage. Do you know what I mean?

(Mr. Yochelson) Yes.

(The Court) Now, it is entirely illogical to go back in an alley, so far as I can see, with an isolated piece of property and value it, when the party who owns that does not own the frontage. Do you follow me?

(Mr. Yochelson) Yes, I understand.

(The Court) So bring that out. On his comparables. Then we are going to quit.

(In open court.)

(311) By Mr. Yochelson:

Q. Mr. Savage, in coming to your conclusion of the value of these properties, you broke them into three separate parcels or sections. A. Yes.

Q. 'A' being that on the front facing E Street; 'B' that in the rear; improved by the six story warehouse building and 'C' being the unimproved lot 50.

You assigned to the rear portions a substantially lower land value because they were alley lots. Does that fact that they are in the same ownership with land facing E Street affect your opinion in that matter? A. I considered that. I really do not think that in any appreciable amount, there would be an effect. I think the values that I have given are sound.

Q. In your comparables you also gave us some sales of properties which are essentially alley properties. A. Yes.

Q. In those cases the owner of the alley property was or was not the owner of the front property facing the street? A. The one I gave up on K—Mr. Bernstein had the Center Market City there and he was acquiring this stuff next to it. (312) I do not think that makes any real difference. I thought about it, and I am satisfied that the values I have put on are sound, even recognizing that.

(The Court) Mr. Savage, the important fact is did the seller of the alley property own the property that fronted on the street—

(The Witness) In this comparable sale that I gave.

(The Court) Yes.

(The Witness) Did the seller? No, the seller did not.

(The Court) All right.

By Mr. Yochelson:

Q. Did that affect your opinion of the value of the alley property at all? A. I recognized that situation. The owner of the one up at 5th and K was Jake Gichner. He did not have any front property.

Q. Mr. Savage, are you or are you not aware that the plans that have been prepared in this case and approved by the District permit the joinder of these two buildings by a walkway? A. Yes, sir.

(313) Q. Would that affect your value at all with respect to that property?

(Mr. Liotta) Objection, Your Honor.

(The Court) Overruled.

(The Witness) I was aware of that and my valuations were set up certainly with a knowledge of that.

* * * * *

(317) By Mr. Yochelson:

Q. Mr. Savage, did you, in your determination of the value of these properties, give any weight at all to sales of the Raleigh Hotel property or the Star Building property? (318) A. No, I did not any more than I did the sales in other parts of the city. I did not think they were comparable. That is the reason.

Q. Don't you think that the Star Building in particular was comparable? A. I do not. To begin with, it is a corner situation, and these are inside properties.

Another thing, the property fronts on Pennsylvania Avenue and there is no relationship in my judgment between Pennsylvania Avenue frontages and frontages along E Street. You might just as well go up to the corner of 14th and F Street.

Q. Well, aren't these buildings comparable in their potential use?

(Mr. Liotta) Objection. I submit the counsel is being argumentative with the witness.

(The Court) The witness can answer.

(The Witness) May I have the question?

(The Court) Read the question.

(The Witness) Well, you asked the question, Mr. Yochelson, as to the Raleigh Hotel.

By Mr. Yochelson:

Q. No, the Star Building. A. They are tearing that down.
(319) (The Court) Mr. Savage, Mr. Yochelson says that he is more concerned with the Evening Star Building.

(The Witness) I think it is an entirely different type of building from a light and air standpoint being on a corner, to this building.

There is a difference in type of construction and in many respects.

By Mr. Yochelson:

Q. Well, don't you consider them in making allowances either up or down because of the differences? A. I did not think that the Star Building shed any light on this. I gave you the Star Garage at 10th and E as shedding light on ground value.

Q. Do you think that it shed more light than the Star Building on 11th Street? A. I do. Because that fronted on E Street.

Q. The Star Building primarily fronts on 11th Street, does it not? A. It has a frontage along 11th Street, yes. But it is still a corner property and fronting on Pennsylvania Avenue. You cannot avoid that.

Q. Weren't there many elements of similarity—wasn't the Star Building an old printing building converted to an office building?

(Mr. Liotta) Objection.

(The Court) Overruled.

(320) (The Witness) The front portion of the Star Building was offices, and the printing part was just in the back.

By Mr. Yochelson:

Q. I did not hear your answer, Mr. Savage. A. I said the front portion of the Star Building was arranged as offices. The newer and rear part was the part devoted to the printing presses.

Q. Wasn't that a reinforced concrete building, substantially like this building on E Street? A. Yes. In construction, but my recollection is that the Evening Star addition on 11th Street is a whole lot newer building than this Merchants Transfer. I am not certain but that is my impression.

Q. Wasn't that converted into office buildings the same thing as was required in the government lease of this property? A. Yes, sir.

Q. Don't you think that fact would have helped you in reaching some conclusions as to value?

(Mr. Liotta) Objection.

(The Court) The witness may answer.

(The Witness) I think you have an entirely (321) different situation. This property of which you are speaking was not a deep property. It had good frontage as you pointed out on 11th Street, good light and air. This building on the front is only 42 feet, and is 187 feet in depth. When you come to construction costs, there may be similarity. But in neighborhood value and location, one being on the corner and the other inside, there is a lot of difference.

Q. Mr. Savage, then, isn't it unusual or is it unusual for an appraiser to take a corner property in fairly close proximity—this was within two blocks, was it not? A. You found that is exactly what I did. I took the corners in close proximity. I could not find any closer one than the corner of 9th and E—The Mills sale. I gave you that. I gave you the Evening Star Building.

Q. The Evening Star Garage. A. Yes. I beg your pardon.

Q. But you do not consider the Evening Star Building, itself is comparable. A. Primarily because it fronts on Pennsylvania Avenue.

Q. Isn't it customary to take a building with (322) a better frontage and make a discount because of that frontage. A. The appraiser is given the privilege of selecting what he considers apt comparables. I have given you those

that I think are the most relative and the most informative. I left out the Star Building because it is on Pennsylvania Avenue. I left out the Raleigh Hotel because it was on Pennsylvania Avenue. As I say, I might just as well, if you go to that, I might just as well go up to 17th and E Street, or 14th and F.

Q. You do not think sales at 17th and I or 14th and F would be helpful? A. As to values on E Street?

Q. Yes. A. Not over and above the comparables that I have given you. I have given you a very representative group that I think fairly interprets the value of this property.

Q. Do not, in your judgment, the Star Building sale and the Raleigh Hotel sale represent a trend of office buildings eastward? A. Well, now, I will agree with you on that, yes.

Q. Do they not also represent a trend of increasing prices in the area? A. I will agree with you on that.

Q. Do you not consider that this increase in trend in prices should be applicable to this property?

(323) (Mr. Liotta) Objection.

(The Court) Overruled.

(The Witness) All of that is reflected in my conclusions of value.

By Mr. Yochelson:

Q. Very well, sir.

Mr. Savage, you approached your problem of valuation in this case on the three traditional and accepted methods. One of them was the capitalization of return method; and you used it to determine your valuation, based on this method, a rental figure of I think 40 cents a foot for one of these buildings. A. Yes, sir.

Q. Do you know of any warehouse base in downtown Washington, in a fireproof building with elevators that is renting for as little as 40 cents a foot? A. No, I do not.

But I am at least consistent. I had to appraise the Macomber Warehouse right across the street, and I used that same figure there.

Q. What does that rent for per foot?

(The Witness) Yes, sir.

(The Court) Do you know the answer?

(The Witness) Well, around that figure. It is (324) merchandise in and out, and some of that gets on a basis of cubic foot of occupancy. But that is not out of line.

By Mr. Yochelson:

Q. Isn't it true that they are paying as much as \$1.00 and \$1.25 a foot for storage spaces in downtown areas?

A. For strictly warehouse space, I doubt it, because I am working on that right now. I can rent one on West Virginia Avenue, a fireproof building, for 90 cents a foot.

I have several that are freely available at Bladensburg Road and V Street.

Q. At 90 cents. A. At \$1.10.

Warehouse space whether it is downtown or just on the edge of town brings about the same rate.

Q. You have said 90 cents and \$1.10. Why don't you use those figures downtown? A. They are new, fireproofed buildings of one-story construction. This is a multiple building with great difficulties in getting in these big trucks, tractor trailers, and I think the differential is more than justified.

Q. The newness does not make it worth more for storage purposes, does it? A. I think it does. Certainly to the man who is renting it. He certainly wants to be in a neighborhood that is attractive. One of the things along V Street that has (325) made it so popular is that the builder has put landscaping along in front of the warehouse. It seems odd, but that is one of its selling features.

Q. Do you think a man wanting to rent storage space, would pay more because he has got landscaping outside?

A. I can tell you that is a fact. Certainly the clients I represent.

Q. Mr. Savage, the basis of your analysis on the capitalization return is that it should yield 6 per cent to the owner, is that right? A. Yes, sir.

Q. So that you—if you increased your rental, your resulting value would be that much higher, would it not?

A. No. As you lower capitalization, your values go up, and if you raise the rate, they come down.

Q. You raise your income valuation? A. That is right. I capitalized ground at 6 per cent, and on the improvements of course I varied. You are aware that not every improved property is capitalized on the same rate. The fundamental is that the greater the risk, the higher the rate of return that is required. You capitalize small investment properties 10, 12, 15 per cent. You capitalize in the 100 per cent block of F Street, and I am referring to the 1100 and 1200 blocks on the north side, you (326) capitalize those at six or seven per cent.

Q. Mr. Savage, I think you conceded, however, did you not, that the highest and best use of this building was for something other than storage. A. Storage is just one income flow. My point, and I hope I made it clear, was that this property has not arrived yet, and the improvements should be looked upon as more or less taxpayers, whether you use the space for storage, whether you rent it to Mr. Todd's discount house to have a warehouse sale, which seems to be a popular use of buildings, they are having them out on Queens Chapel Road and Bladensburg Road; or as to the rear building, that could very readily be used by some printing concern because it has such a good life load capacity.

Q. What would a printing concern pay as rent? A. As the building is now, not corrected in some respects, they are not going to pay any more than I said they would. But

the rear building could be made usable far more for rental than the front building.

Q. Why? A. Because I am convinced of the obsolescence and depreciation facts that I have given you on the front building.

Q. Is there anything wrong— (327) A. Just a minute, please.

(The Court) Wait a moment, Mr. Yochelson.

(The Witness) I am aware that a much newer building, the Raleigh Hotel was torn down for new construction. I am aware that the Raleigh, which I think is newer than this building, is being torn down, not only because of the age but because of the general layout. The rear building has some working possibilities. I think you could correct that crack in the wall that I mentioned. I think you can put in a better stair well and you spend that money and it is going to pay you back. You will get a good return. But with the narrow stair well that exists there today, with the one old freight elevator that was there, with the windows blocked up, and with the crack in the wall, I think 35 cents per foot now is a right good figure for it.

Q. Do you know of any printing houses paying 50 cents a foot rent? A. I looked carefully for something that was more or less comparable to this building in an alley. There is one up in Greens' Court, which is at 14th and Massachusetts Avenue. But I could not get any information. I had to rely on my overall experience for that conclusion.

Q. I think you testified that in your judgment the front building would probably find its highest and best use (328) as a discount house. What would they pay as rent? A. Overall for the building, not any more than I have put on it. Because I have put 40 cents per foot, overall, Mr. Yochelson: Whereas, the use for this building by many occupants might be restricted to just three or four floors.

So, in effect, for the usable part of it, I think I have been quite fair.

Q. Can you assist us with any comparable rental of discount houses at something near fifty cents a foot? A. I do not recall any.

Q. Do you know what they do pay for rent? A. Warehouses?

Q. No, discount houses. A. I think it is proper to answer that by telling you what they pay for warehouses, because they are using warehouses for discount sales.

Q. What will they pay for that? A. They will pay in the range that I have given you.

Q. Ninety cents and \$1.10? A. I am very familiar with it. I am leasing one for 75 cents at 1935 5th Street to Charles Stott & Company. Now, the discount houses on today's market, and that is what I had to consider. I am looking right now for one—they are (329) ranging around 90 cents, \$1.00 and \$1.10. That is what they are asking.

Q. Not in the downtown area, are they? A. No, sir. But your today's warehouse is up at 7th and Riggs Road. What is the other man's name—Wasserman, is it?

Wasserman has his place at Queens Chapel Road and Bladensburg Road.

Q. Are you familiar with a lease that he just made for additional space on Queens Chapel Road? A. No, sir, I am not.

(Mr. Yochelson) No further questions.

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(330) (Mr. Bernstein) I could not hear.

(The Court) He rested his case with the reservation in rebuttal and such.

(Mr. Liotta) Rebuttal, of course.

(Mr. Yochelson) I wonder whether we might have a bit of time to get my witnesses down. I have one coming at ten thirty. I did not anticipate getting through so early.

(Mr. Bernstein) He may be out there now. He told me ten-thirty. Could I go out in the passage and see?

(The Court) Yes, see if he is there.

(Off the record.)

(The jury left the court room at 10:07 a. m. and a short recess was taken.)

(331) STANTON KOLB

a witness called by counsel for the property owners, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Yochelson:

Q. Will you state your full name? A. Stanton Kolb.

Q. Where do you live? A. 5218 Manning Place, Northwest, Washington, D.C.

Q. In what business or profession are you engaged, sir?
A. Real estate and insurance and appraising.

Q. Are you associated with some firm or are you engaged in your own behalf? A. My firm is J. Leo Kolb Company, Inc.

Q. What office do you have with that firm? A. I am its president and owner.

(332) Q. Where is its office? A. 1237 Wisconsin Avenue.

Q. How long have you been engaged in this business?
A. Thirty-two years.

Q. I ask you, sir, whether or not you have specialized in any facet of the business? A. Brokerage and real estate appraisals.

Q. To what extent have you devoted your time to appraising? A. In the last ten or twelve years, close to fifty per cent of my time.

Q. Have you, Mr. Kolb, attended any courses to prepare yourself for appraising? A. I have, sir.

Q. State what, sir. A. I have attended the Institute of Real Estate Appraisers Course at MIT in 1951 or 1952; Indiana University in the same course.

Q. Have you been or are you a member of any appraisal groups, societies, organizations? A. Yes, American Institute Real Estate Appraisers; I have served on the Evaluation Committee of the Washington Board of Realtors, and other such groups.

(333) Q. Do you hold any office in any of these associations? A. At present I am the vice president of the local chapter of the American Institute of Real Estate Appraisers; Board of Directors of the Washington Board of Realtors, also.

Q. Mr. Kolb, have you previously qualified to testify in this court in appraisal matters? A. Yes.

Q. Name some of the cases in which you have appeared as appraiser. A. One of the more recent ones was in the government, taking of Square 5 in Foggy Bottom. I made the appraisals of that Square for the government, about 130 parcels; and testified in some seventeen of the cases that did come to trial. The other cases were settled.

I made several hundred appraisals in the Southwest Re-development area for the government. There have been others.

Q. And have you at anytime been a lecturer or teacher of appraisal? A. Yes, I have lectured at American University over a period of the last ten years in their real estate course, lecturing principally on the matter of appraising in connection with the sale of real estate.

(334) Q. Mr. Kolb, have you testified in condemnation cases in behalf of the owners of properties as well as the government? A. About fifty-fifty.

Q. And does this apply to the District of Columbia Government as well as to the Federal Government? A. It does.

Q. Will you name, please, sir, some of the private firms or individuals for whom you have been engaged to appraise.
A. National Permanent Building and Loan Association, American Security and Trust Company, Metropolitan Life Insurance Company. It is hard to keep them in mind when they are once completed.

Recently the International Bank taking at 18th and G Street for the owners, John Loughran. There has been a dozen or more. They slip one's mind after they are once done.

(Mr. Yochelson) I submit the witness is qualified.

(Mr. Liotta) May I examine?

(The Court) Yes, you may.

By Mr. Liotta:

Q. Mr. Kolb, who did you appraise properties for in Foggy Bottom—was that the United States, or the District of Columbia? (335) A. District of Columbia.

Q. Of all of the properties in Foggy Bottom that you appraised, how many of them were commercial properties?
A. I would like, Mr. Liotta, to correct something. I said the District of Columbia, but it was also the United States Public Roads, it was a joint undertaking for highway purposes, I understand.

In that square of one-hundred thirty-odd parcels, there were about four commercial pieces, commercially-used pieces, non-conforming commercial.

Q. What do you term commercially used pieces? A. A grocery store—two grocery stores, and two vacant ex-grocery stores.

Q. Two grocery stores and two vacant ex-grocery stores?
A. Yes.

Q. Now, primarily your appraisal work in Southwest Washington involved residences, did it not? A. By numbers, yes. Churches and commercial properties, also.

Q. All right, sir. Now, what percentage of your work is contained in the Georgetown section of Washington?

A. In my appraisal field?

Q. Yes, sir. (336) A. Less than one per cent.

Q. Less than one per cent? A. Yes.

Q. Where is the other balance of 49 per cent? A. Commercial properties, particularly for the government. I fairly recently did for the Federal Government, the General Services Administration.

Q. Would you please answer my question? In what location—

(Mr. Yochelson) I submit he is trying to answer.

(The Witness) It was the Times-Herald Building in the 1300 block of New York—later taken over as the Washington Post Building.

We appraised that for the government to find the fee value and the rental.

By Mr. Liotta:

Q. And you appraised the one building for the Loughrans? A. Yes, sir. That was the only piece they owned that was in the taking.

Q. In the past two years, how many commercial properties have you appraised, approximately? A. Seventy-five or one hundred.

(337) Q. Were these located in the downtown section of the City of Washington? A. Most of them. I would not say 'most.' I would correct that; many of them.

Q. Well, by 'many,' do you mean half, or less, or half or more? A. To give you a correct answer, I would have to refer to my records for this. But if you want to continue in this area of 9th and 10th and D and Pennsylvania Avenue, appraisals for property owners there numbering six or seven in this two-square area.

(Mr. Liotta) All right, sir.

I have no further questions.

(The Court) All right.

By Mr. Yochelson:

Q. Mr. Kolb, have you, at any request, made a study of the property which is the subject of this condemnation?
A. I have.

Q. Please describe it to the jury. A. The property consists of, 920 E Street, of the old Merchants Transfer Building. It consists of twelve lots improved by two structures which communicate by a gangway crossing an alley.

(Mr. Liotta) I object to this question as far as (338) 'gangway' is concerned.

It has been agreed there was no gangway at the time of taking of this property. It was as we saw it.

(The Court) Mr. Yochelson, will you put the time on it?

By Mr. Yochelson:

Q. Mr. Kolb, will you please confine your description as the conditions existed on January 18, 1963.

(The Court) Mr. Yochelson, I think the jury would like to know when Mr. Kolb made the appraisal.

By Mr. Yochelson:

Q. Mr. Kolb, can you tell us when you entered into your duties of appraising this property. A. May of 1962.

Q. Very well. A. The property is improved by two structures, physically separated by an alley.

The site I have broken down for my purposes of identification into three parcels, because the parcels do relate. I have broken it down to A, B and C.

Parcel A is that which fronts E Street, has a frontage on E Street of 42 feet. On the south side of E Street.

It also fronts 82 feet on a thirty-foot rear public alley. (339) It is irregular in shape, it is "T" shaped. The lot contains 11,734 square feet in that front parcel.

The rear parcel that I have identified as parcel B because they related in their usage and that consists of lot 831, lot 50 and lot "E" through "K." That is an improved and unimproved parcel.

Lot 50, unimproved, measures 30 by 77 feet; it fronts on a thirty foot and a fifteen foot alley. That lot contains 2336 square feet.

Lot 831, which is across the alley and lots E to K, which are contiguous, front 110 feet—front a 110 foot alley and two thirty foot alleys, and one—

Q. Excuse me, Mr. Kolb.

You have referred to lots E and K. A. E through K.

Q. Thank you. A. This parcel is improved by a structure approximately 100 by 85 feet in dimensions.

The lot, itself, contains 10,236 square feet.

Parcel C is that which was currently used as a parking lot, fronts the south side of E Street, is known as lots 817, 818 and 836. It is unimproved but for a little parking lot structure of no value.

(340) It fronts the south side of E Street by 76 feet, the north side on a thirty foot alley by 36 feet. It is irregular in shape—has a depth of 187 feet.

It contains 13,454 square feet. The total of all of the real estate of A, B and C, contains 35,127 square feet.

Their being 118-foot street frontage, 694 feet of alley frontage, and has a public space frontage in total of 812 feet.

Q. How is this property, or how was this property zoned on January 18, 1963? A. As a downtown business corner zoning which is C-4.

Q. What use does such zoning permit? A. The maximum development of a land site within the downtown business area, allowing the maximum lot coverage, the maximum structure and the maximum height that is permitted under zoning regulations within the District of Columbia.

Q. Let me divert your attention for a moment before we describe the properties in particular, and ask you if you can describe the area and tell the Court and jury your judgment of trends in the area? A. The area?

(341) I assume you mean the neighborhood area and not the building area, is that correct?

Q. Yes. A. Prior to January of 1962, our study or my study led me to the conclusion that this immediate area was in the middle of a very strong office building boom. I have documented 29 buildings within an immediate neighborhood area, including such buildings a block away as the PEPCO Building across the street, Potomac Electric Power Building, the Perpetual Building and Loan Association Building, the Standard Oil Building just nearby here, the Fifth and F Street Pension Office Building, the Munsey Trust Building and the Warner Building at 13th and E, the District of Columbia Municipal Center across the street from us here, the new Federal Building at 6th and Pennsylvania Avenue, the Teamsters Building at Louisiana and D, the Accacia Mutual Life Insurance Building, the Federal Home Loan Bank Board Building at 1st and Independence; the National Association of Letter Carriers Building at 100 Indiana Avenue; the McShain Building across the street from the Court House Building here; the Court House Building, itself. The General Accounting Office at 4th and G.

This area did not find itself strange for development into office buildings. It has and long has been the trend for newer structures in this area.

(342) Q. In view of that, have you formed any conclusion as to the highest and best use of the property involved? A. I have.

Q. What is your opinion with respect to that? A. The parking lot is a very excellent potential and existing office building site, as many of the open air parking lots such a usage is just to pay taxes in the meantime. But it is an office building site and will be developed as such.

Q. Mr. Kolb, let me interrupt and ask you whether or not you think definitely this depth of this lot of 187 feet

is a detriment as an improvement of an office building site?
A. The vacant lot?

No, to the contrary, it has a good frontage on public alley down the east side of it and across the south side of there which adds an excellent advantage to this office building in that it shares light and air with this alley without having to pay taxes upon it.

The other structures, in my opinion, would be as has been done in a number of cases, this warehouse building could readily be converted into office building space.

Among the best evidences of that would be the General Services Administration, conversion of the Department—
(343) (Mr. Liotta) Objection. We are now getting into more government situations rather than going to the general market and I object to it.

(The Court) I do not understand the objection.

(Mr. Liotta) May we approach?

(The Court) Yes.

(344) (At the Bench)

(Mr. Liotta) I respectfully submit he is going again into a situation involving the government need throughout the District of Columbia. I have consented to the admission of the letters in this case for the purposes of showing merely the highest and best use. But when he starts talking about what the government did here and what the government did there, there may be a lot of reasons why the government did it. It may have been condemned or it may have been anything. I do not know what. But then, I do not know what the element of need is there. This carries us far afield of the situation that we have here.

(The Court) But isn't it to be received more in the nature of comparables?

(Mr. Liotta) Well, Your Honor, I submit that in so far as government buildings and government leases and government sales, that the element of the government need is

present. The possibility of condemnation was present and always is present, and when we get into these other government transactions, we are far afield from the fact that here, as in accordance with Your Honor's ruling—and I have consented to the admission of this particular government lease for purposes of showing the highest and best use. (345) Now, he talks about government leases or government buildings. I will have to go into the fact that they were, or whether they were under the threat of condemnation and it will carry us all over the field. He should maintain himself to what the market is doing and not what Uncle Sam is doing.

(Mr. Yochelson) In the City of Washington, Uncle Sam is one of the largest factors of making up the market. He is testifying this highest and best use as an office building. One of the reasons apparently he reaches this conclusion is because there are or there is so much demand for office building space on the part of the government.

(Mr. Liotta) If I may give an example, in the old Eye Center involving Garfield Kass Building, the government, I cannot describe it or advise as to the nature of the government's activity, but the government went into that building many years ago. Because of the fact that they apparently could not arrive at an agreement, they finally wound up in a condemnation case.

(The Court) But in an effort to be fair, you cannot exclude the government activities.

(Mr. Liotta) Your Honor, on the basis—

(The Court) In other words, you cannot say that (346) because the government is involved, he cannot testify about it.

(Mr. Liotta) Well—

(The Court) Mr. Liotta, do you contend there was a threat of condemnation at the time this lease was entered into?

(Mr. Liotta) I have contended all along that every gov-

ernment lease and every government contract is subject to—whether in this particular case, it was done before or after, it was due for condemnation.

(The Court) Now, the Unemployment Compensation Building next door, would you do this—would you exclude that because of the government?

(Mr. Liotta) You mean as far as the sale is concerned, or the lease?

(The Court) Anything.

(Mr. Liotta) Yes, sir.

(The Court) Objection overruled. The government is in the position of being in this market. Now, we are not going to say that because the government is involved, that we will hear no testimony. There is no showing. You might bring out the testimony on cross examination that the government had to go to a particular place.

(347) (Mr. Liotta) That is my point, Your Honor.

Each one of these government leases or government sales—these elements would have to go into—we would have to go into them.

The witness can look to the market rather than to the United States.

(The Court) But the United States is the market. That is the point. Certainly they are involved in practically every—I do not know how much percentage-wise that they own of the District of Columbia, but certainly it is a large percentage.

Now, we are not going to exclude the United States Government on the basis that they are not making the market.

Off the record.

(Discussion off the record.)

(Mr. Liotta) May my objection be noted on the record?

(The Court) It is on the record.

(Mr. Liotta) May I say this for the record: I submit these reflect the special need or special value to the party having eminent domain and I object to the admission of any sales or any leases to the United States (348) or the District of Columbia or any authority having power of eminent domain.

(The Court) The Court feels that you should be prepared to show that on cross examination.

(Mr. Liotta) Yes, sir.

(In Open Court.)

(349) By Mr. Yochelson:

Q. Mr. Kolb, you were in the process of answering questions. Do you have your train of thought, sir? Or would it be helpful if the reporter read the question.

(The Witness) I would prefer it if it is not too difficult.

(The reporter read the record.)

(The Witness) I have my train of thought.

It is, as I best recall, —the question prior to this had to do with what might be the highest and best use—and that was leading into what you could put upon this land.

Well, really, I look into highest and best use as the question.

The highest and best use I testified on the parking lot, would be—it is an excellent potential office building site. So far as the improved portion of the real estate, the remainder of the old warehouse, it is reasonable to believe that it could reasonably and economically be converted from a warehouse into office building space, and in my probing of this, I wanted to test, myself, 'Well, has it been done, and has it been done economically; is it a reasonable thing to do?'

So I started to look for cases where it had been done.

(350) You may recall that the May Hardware Building on New York Avenue extended, just before you get to

Bladensburg Road, is now occupied by I think it is IBM as office space.

(Mr. Liotta) Objection. That area is not comparable as such.

(The Court) The objection will be overruled.

(The Witness) And that was one of the instances.

Another instance that came to mind was the old Department of the Treasury warehouse building at 5th and D, I think it is, at the Railroad Tracks, southwest.

That building has been converted from a warehouse building into a very first-class office.

(Mr. Liotta) Object.

May my objection run to these answers rather than my standing up for the same reasons I stated.

(The Court) Yes, sir.

(The Witness) There was a warehouse building at 25th and Virginia Avenue that was converted into office space, not first-class office space, some eight or ten years ago.

So, I began to see there was a pattern of this and a possibility of accomplishment. I reasoned that these structures could reasonably—economically and profitably be converted from the past use into a good (351) current use of office buildings, and that I did. I found the highest and best use for this site of real estate to be for first class office space.

By Mr. Yochelson:

Q. Mr. Kolb, did you make some examination of the present structures to determine whether or not they were sound enough for such conversion? A. I did.

Q. What was your conclusion? A. I came to the conclusion and the records supported me, the public record, I mean, that this building has a floor load of in excess of 120 pounds per square foot.

That is a floor load that is in demand by office space buy-

ers, particularly such office space buyers as your heavy electronic equipment.

I found the shell of the building, the skeleton, to be in good repair. It helped me at the time of my inspection, that sometime in 1961 or 1962, rather, some work had been commenced and the concrete had been broken—

(Mr. Liotta) Objection. He is now going into the possible frustration of owners' plans, coupled with my other facts and statements as to the objections of this type of evidence.

(352) (The Court) The objection will be overruled.

(The Witness) The opportunity was afforded me to see the steel and concrete structure, not just from the top of the floor level or ceiling but to see what was inside of it, because a small area had been broken up.

By Mr. Yochelson:

Q. Mr. Kolb, does a structure of this type, the concrete portion of it, the shell, become better or worse as the thing ages? A. I did not hear the last part.

Q. I said as it ages. A. As it ages?

Q. Yes. A. It has no material effect on the soundness of the building, the steel and concrete in this building might tire out in another hundred years, but it is going to take that long.

Q. Will you please describe the improvements as you found them? A. Well—

(Mr. Liotta) Is this referring to the date of taking in this case?

(Mr. Yochelson) I will ask you, Mr. Kolb, if you (353) would confine your testimony with respect to those improvements as of the date of taking, which is January 18, 1963. A. I found, upon my inspection, a building that had been used as a warehouse building by the Merchants Transfer Company. I found that that building was of concrete and steel skeleton, with a brick facing on it—unattractive.

A substantially beat-up elevator, minimum electrical and plumbing system and minimum heating system, just that which you would expect to find in a warehouse.

The front portion of the building contained, according to my calculations, 91,631 square feet of space.

The rear building contained 46,923 feet of space, and there is a total in both buildings, improved and floor area of 138,554 square feet.

The building is as to physical condition, sound as I said, unattractive, other than a warehouse, upon my inspection.

Q. In your preparation to reach a conclusion as to value of this property, what approaches did you use? A. The conventional three approaches of comparable market data, income, capitalization approach and the reproduction cost approach.

Q. Did you find any one of these to be more helpful (354) than the others? A. I found each of them to be a good guide.

In my opinion—it was my opinion and not a mathematical opinion—it was my own opinion.

Q. Did you consider other sales of property which you considered to be comparable. A. Yes.

Q. Will you give us the benefit of those sales.

Let me caution you, sir, not to use any sales after the date of taking which we have agreed was the date of public notice, January 4, 1963.

(The Court) January 2, 1963.

By Mr. Yochelson:

Q. Sorry, January 2, 1963. A. I understand.

(Mr. Liotta) I might say I object to his giving any sales until they are preliminary qualified under 61 parcels of land.

(Mr. Yochelson) I did not hear that.

(Mr. Liotta) I object to the witness' testifying to any sales until they have been preliminarily qualified.

In other words, Your Honor, until he has testified, I respectfully submit that these sales were free of any element of coercion, compulsion, or compromise, I (355) would submit they are incompetent up to that point. That is my objection.

(Mr. Yochelson) I think Mr. Liotta is correct. Let me ask another question.

By Mr. Yochelson:

Q. Have you made investigation of the sales as to which you are about to testify, to determine whether or not there were any elements of coercion, duress or any element other than a fair market value—fair market sale involved. A. I have.

In each instance, we look with suspicion upon a sale and seek out if there is any unusual circumstance that might have resulted in this sale price.

Q. Very well.

Now, will you please continue. A. One of the sales, and that was our desire to keep the sales close in physically to the subject property—was the sale of land at 628 to 633 D Street, and 621 to 635 Indiana Avenue, Northwest, a block from us here, where we are sitting.

Q. Will you give the date of those sales and the parties? (356) A. Yes.

Well, we will start with the parcels. It is Square 458, lots 410 through 18, lots 804 through 806, and 831.

Q. What does the total area involve? A. 16,381 feet.

Again it was the desire to try to find comparable-sized land and comparably situated to try to make the comparison.

Q. How are the properties zoned? A. C-4 as is the subject.

Now, this property was assembled by Abe Pollin, from the Stern Company, at \$50 a foot.

(Mr. Liotta) Object. Made after January 2, 1963.

(The Court) I do not think that Mr. Kolb would testify to this jury if it were made after January 2, 1963.

(Mr. Yochelson) I have asked him not to.

(The Witness) It is my record that this was a 1962 sale.

(The Court) You checked it, have you not?

(The Witness) Yes, sir.

I will also say that some part of these sales, and there are about four or five sellers, may have been settled after January of 1963 but this one was before that.

(357) By Mr. Yochelson:

Q. Do you have the dates of the contract—not the dates of settlement? A. I will in my work notes but I do not have them here.

(The Court) Let us adjourn, Mr. Kolb, and will you check it, Mr. Yochelson?

(Mr. Yochelson) You do not have your work notes with you?

(The Witness) I do have my work notes with me but not here on the bench before me. I do have the other sales.

(The Court) Let us settle this, Mr. Kolb, before we go any further.

By Mr. Yochelson:

Q. Are your work notes available? A. Yes.

Q. Will you please take them. A. Yes.

(The Court) We will take a few minutes and Mr. Liotta will have a chance to go over it and check it thoroughly. It is the understanding that Mr. Yochelson has advised Mr. Kolb not to testify about any property being (358)

sold or that changed hands after January 2, 1963 unless the contract was entered into prior to that date.

(Mr. Yochelson) Yes, sir.

(Short recess.)

(Mr. Yochelson) If the Court please, with respect to this last sale, we have been making an effort to verify what the situation is.

May I state to the court what we have learned this far and ask the Court's permission after lunch to see if we cannot get documentary evidence?

Our information is that there was, and I think Mr. Liotta agrees with this, there was an option in April, 1962, for which the option cost—he paid \$5,000 for the option.

We are further informed that for an additional \$10,000, making a total of \$15,000, the option was extended to October, 1962.

In October, 1962, the option was exercised and a six month's period of settlement was obtained. That within the six months, the settlement was made at the Lawyers Title Company.

We do not have the papers yet, but we did speak to one of the two joint venturers.

(Mr. Liotta) I would not have exercised this objection, as Your Honor knows, I am sure, unless I was informed otherwise.

However, I certainly understand what counsel is saying.

I have talked with my appraiser and, as I understand it, he had talked with Mr. Pollin and had gotten different information. I think, if it can be clarified one way or the other, because I had instructed legalistically our appraisers not to consider that because of that reason.

(The Court) Well, we will have further information after lunch.

(Mr. Yochelson) We will make an effort during lunch to get it.

(The Court) All right.

By Mr. Yochelson:

Q. Mr. Kolb, will you go to the next sale that you considered? A. Yes, I will.

The sale that we considered was a sale and resale of No. 933 D Street, which is Square 378, Lot 805.

It is a site nearly directly behind the subject property, 30 by 100 feet, irregular in shape; it does extend to the alley and has an area of 4428 square feet. It was sold under contract of June, 1962 with the settlement being made in January of 1963. January 22, 1963.

Between Robert Nash and Norman Zipkin, for (360) \$100,000 or \$22.58 a foot.

It was resold under contract of the last week of November, 1962 with settlement taking place on February 4, 1963, to Mr. Norman Morris and Eric Baer. I confirmed this with them personally, for \$43.36 a foot. That related to an increase between the two sales of 92 per cent in the 7-month period.

There was a sale in January—January 23, 1962 of the northwest corner of 12th and E which is Square 290, lot 843. That was a sale of a site of 85 feet on E Street, and 172 feet on 12th Street, fronting 85 feet on an alley. It was sold by Christian Heinrich, Jr. to Charles E. Smith and Dominic Antonelli, for \$75 per square foot for \$1,200,000.

By Mr. Yochelson:

Q. Let me ask you whether or not you considered the fact that this is a corner property makes it incomparable or not really comparable to the property at hand? A. It makes it comparable to that by way of adjustment of a corner value against an inside site value. The comparability has to be adjusted as to the area, the size of the area has

to be weighed against the size of the area of the subject property.

Q. Is it a normal practice for appraisers to make such adjustments? (361) A. We must make an adjustment on the basis of judgment.

There was a sale November 21, 1962 of 411 and 413—11th Street, which is Square 348, lot 808 and 809. That site is 27 by 100 feet, contains 2852 square feet, no alley.

It was sold by H. S. Jacobs to Fulton Brylawski, for \$126,000, or \$44.10 a square foot.

Q. Let me again ask you, sir, is it necessary to make adjustments in a sale of this kind to establish value of property you are seeking to appraise? A. Yes, to estimate the value of a subject property I have got to bear in mind we are comparing against an inside lot of 27 foot frontage, no alley.

The alley does give advantage to value. And to location.

Q. Go back to 12th and E and ask you did you make an adjustment so as to— A. I did.

Q. How did you do it? A. We know the corner has an influence, a corner influence value, and that is a plus value over the inside property.

Q. To what extent in your judgment does the corner of a property, have an increased value? (362) A. A rule of thumb could be ten to fifteen per cent over an inside piece increase.

Also depending upon which corner it is, has an advantage. All the four corners of an intersection are not necessarily the same value.

Q. Go ahead.

You had some other sales that you considered, sir. A. Yes.

Further, as comparing the Smith site against the subject property, the Smith property contained 14,600 feet.

The subject property contains 35,000 feet.

Q. Does this give the greater or lesser value to it. A. It would give subject a plus value over this. It does not mean plus over \$75. But in adjusting it, it has an advantage in 35,000 feet in one ownership and contiguous to 14,000. It would be at least twice as much.

Q. Does the fact that there is an intervening alley destroy this contention? A. Destroy the value of the land on the opposite side of the alley?

(363) Q. Yes. A. It does not destroy it. It decreases it.

Q. All right.

You may continue, please. A. There was a sale—and still attempting to keep all the comparables as physically close in as possible—up F Street, which we will agree is not the 900 block of D Street or not the 900 block of E Street rather.

Q. Do you recall which, in your judgment is better? A. F Street. There was a sale in September, 1961 of the Columbia Palace Corporation to Safeway Stores, Inc., at \$54.72 a foot for a fifty by 100 foot irregularly shaped piece of land, no alley, and containing 7309 square feet.

Here it might be pointed out the adjustment has to be rather drastic, in my opinion, between 1961 and January of 1963, as well as the adjustment in location.

Q. What adjustment would you use between them? A. The downtown progress undertaking has gained momentum during this period, was gaining publicity, and there was a hope certainly that the things and wishes anticipated or expected would come into being, and there were moves in the direction of the fact there were, as witness the remodeling of office buildings in this area and new (364) construction of office building in that area, in this 1961 to 1963 period.

These all influence the value of the slant, I would believe that if this F Street sale of 1961 were to take place in January of 1963, my judgment would be that the sale would

be double, or near double, the \$54 a foot price that was obtained.

\$100 to \$108 could have been obtained instead of the \$54.

Q. Did you consider any other sales? A. Yes. Nor did we rest our hat solely upon those sales. There were sales such as the Raleigh Hotel, the Evening Star Building—

Q. Do you consider that they are comparable? A. They are capable of adjustment between one location and the other location, adjustment in time, adjustment between every area and physical footage. Yes. There are elements of comparability. Every property within a radius of two or three blocks bears some relationship to the other, and it gives us differences in similarities that can be adjusted.

Q. Did you then come to a conclusion of the land value in the site? A. Yes. I estimate the value of parcel A and (365) Parcel B, which parcel is that which is covered by the front warehouse building and the rear warehouse building, and the vacant lot immediately west of the rear warehouse building, that area 21,673 feet I have estimated at \$55 a foot.

I have estimated the parking lot on the south side of E Street and east of the improved property at 13,000 feet with its good frontage and alley frontage at \$60 a foot.

Total estimate for land I have estimated at \$1,999,000.

Q. Why did you consider that the land on which the E Street improvement is erected to be worth \$5 a foot—worth more than \$5 a foot more than the parking lot adjoining? A. Because I believe the parking lot is a street frontage that has an advantage over the rear property, which rear property, to get its highest and best use, must be used in conjunction with the existing improved front property.

Q. Do I understand then that your \$55 is an overall price of the front and back. A. Yes. It is applying somewhat of a penalty to both.

(366) Q. Did you make any effort to appraise the lots separately? A. Separately as to the parking lot, yes, and as to the improved portion and its alley parking lot.

Q. How did you give value to the improvements? A. I did.

Q. On what basis? A. Their usability, as witness the fact that they had been in continuous use for many years as a warehouse. Its use today could be that of a warehouse and would produce an economic return upon an investment.

Q. What, in your judgment, was the value of the improvements on the date of taking? A. I calculated the improvements on parcel A and parcel B—I have spoken already of their square foot area.

The building in the front has a perimeter of 533 feet and contains 1,072,000 cubic feet, as of January, 1963, and, using—among other factors—the Beck Engineering Cost Manual for the District of Columbia as of that month, we came to a reproduction cost of the front building, its 'current value' after putting in depreciation factors, of \$667,000.

(367) Q. What factor did you use per square foot? A. I used an index figure of Beck's manual, which related—I have it further down here—that equates to \$7.62 per square foot for new construction is the new cost that I used, less the physical depreciation that I used of 10 per cent.

So its value as is, is 10 per cent less than \$7.62 per square foot.

Q. Do I understand that— A. That is for the front building.

Q. Do I understand that you find only a ten per cent depreciation in the front building? A. As a warehouse.

Q. Notwithstanding its age? A. Notwithstanding its age, the building still has utility and in my opinion, will have utility as a warehouse for many, many years to come in its present form. The ten per cent depreciation which equated to \$74,000 would be principally used, in the elevator and improvement of the electric system to bring it up to new, as a warehouse.

Q. Do I understand then it is your judgment that if \$74,000 was spent on this building, it could be put in shape as a new warehouse? (368) A. That is correct.

Q. Or comparable shape? A. Yes.

Q. So you, therefore, conclude that the improvements as a warehouse was worth how much? A. \$667,000 for the front building.

Q. Did that include or not the depreciation? A. The depreciation has already been taken off prior to my estimate of \$667,000.

Q. Does your figure of depreciation include what is normally called obsolescence? A. Physical obsolescence or depreciation, yes. As a warehouse space I found no economic obsolescence or functional obsolescence.

Q. What about the rear building—did you conclude that that had value? A. Yes. My value estimate on it is \$284,000.

Q. How did you reach that value? A. The value of the structure new, at \$7.62, 10 per cent depreciation, adding in the value of the elevator existing, taking off the ten per cent depreciation—I have already said that—we came to \$284,000 figure.

Q. What then was your total estimate of value, using (369) this basis of approach? A. Using this basis of approach, and including land, that which I found existing as warehouse and vacant land in the entirety of all the property, of 35,000 feet, \$2,943,000.

Q. Are you aware of the price for which this property was bought by the present owners? A. I am.

Q. Does that in any wise affect your conclusion as to the value of the property at the date of taking? A. It has no influence on me. If they made a good deal, they made a good deal.

Q. Will you check your arithmetic with regard to the total value of the property on the basis of the land and building tract? A. Yes, I will. I see this is one place where

I found in reviewing my report, I had made a \$7,000 mistake which I did not correct on this sheet. More correctly, it should be \$7,000 more. Therefore, it should be \$2,950,000, rather than forty-three.

Q. What other methods of approach to valuation did you use to determine the fair market value of this property?

A. Reproduction.

Q. You have just testified with respect to that. (370)
A. Reproduction as a warehouse I have testified to. I have not testified as to reproduction that I ran as an office building.

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(371)

STANTON KOLB

a witness, resumed his testimony further as follows:

DIRECT EXAMINATION (continued)

(The Court) Proceed.

By Mr. Yochelson:

Q. Have you verified the date of the contract of sale as to which you testified? A. As to—

Q. The property on Indiana Avenue? A. As to the Pollin, on D Street, in the 600 block, I have before me a photostatic copy of part of that assembly, which contract is dated October 17, 1962, on the Behrens Sales Co. form.

Q. Do you have a copy of the settlement sheet showing when the settlement was actually made? A. I have it from the Lawyers Title Company of Richmond, Settlement Date March 16, 1963.

Q. This was a March settlement, settlement of October. 1962 contract. A. Yes.

May I make a further correction?

(372) The face of the contract shows October 17 of 1962, but the acceptance of the contract is October 18, 1962, the following day.

Q. Thank you very much, Mr. Kolb.

Will you be good enough to let Mr. Liotta see these.
A. Yes.

Q. Will you return, please, sir, to your methods—appraisal methods of procedures and outline to the Court and the jury, please, your steps and methods employed in your determination of value of this property on this capitalization return base? A. Yes, I will.

In my judgment, this property, the existing property, including improvements, would see and find its highest and best use in the conversion of the structure from a warehouse building to an office building to be rented to individual tenants, or to a bulk tenant, a single-user tenant, one or the other.

Q. Excuse me, sir.

Were you aware that on January 16, 1963, there was a lease on this property? A. I am.

Q. Did this in any wise affect your determination as (373) to what the highest and best use of the property was. A. No.

Q. Very well. Go ahead. A. I think I have answered the question as to what is the highest and best use and the highest and best use would be developed by its conversion into an office building.

Q. Did this confirm your judgment, this lease? A. No, I made up my mind on my own.

I do not think that the lease that existed is the evidence that brought me to the highest and best use. I came to this conclusion via the route of the documentation of the office buildings lying to this side of town, east of this property, that had been remodeled into office buildings from other uses, or new office buildings being built to the east of this.

The trend was well established so that the lease in January can confirm my judgment, but it does not influence it.

Q. Now, for the purpose of the use of these improvements for the highest and best use which you have described, what rental income do you feel you would receive?

(Mr. Liotta) Objection. May we approach?

(374) (At the Bench.)

(Mr. Liotta) Your Honor, I am presuming that now what is coming is the capitalization of income under this lease and projecting the income over a period of years and the assigning that as value.

I submit that is contrary, as I understand it, to Your Honor's ruling. It is my understanding this lease could be introduced for showing the purpose of its highest and best use only, and a capitalization of a building that does not exist is just pure hypothetical conjecture and leaves some things open, Your Honor. Capitalization rates we are going to get into and depreciation on a building that is not there.

I respectfully object to that and submit that it is not in accordance with Your Honor's ruling.

(Mr. Yochelson) Let me say this—if the Court please.

(The Court) Keep your voice down.

(Mr. Yochelson) I think it is in accord with Your Honor's ruling. Your Honor has admitted the lease, as showing the highest and best use, into evidence.

It shows that it can be used as an office building as its highest and best use, and as an office building it can produce X dollars.

(375) Your Honor permitted, and I did not object to government appraisers saying that in their judgment the highest and best use was as warehouse space in their judgment, and in their judgment the rental would be forty or fifty cents a foot in their judgment.

There was no tenant there and they had to use their judgment as to the rent it would bring.

That is no different than this witness.

(Mr. Liotta) It is on the basis of the improvement in existence. The improvement he is talking of is not in existence. There is no way of differentiating at this point what they are trying to set up as value.

(The Court) Well, didn't Mr. Throckmorton and Mr. Savage testify that in their opinion, the highest and best use was a loft-type building?

(Mr. Liotta) The use of this present plot as it existed; yes, sir.

They were not talking about something in the future. They said this present plot as it existed.

(The Court) I do not think so. I think that they were talking about a loft-type building to be rented.

(Mr. Liotta) Your Honor, I specifically recall—and I submit that one of the things Mr. Savage said was that (376) if this were used for this loft-type building on here, used for loft or display purposes, that the second floor on the building would not be much value, not have much value and gave 40 cents on a total square footage of the holding.

He was talking about this building.

(The Court) The Court recognizes the importance of the disposition of this particular objection, because the Court even goes so far as to put on to the record that it may be reversible error. But the Court is going to allow the testimony.

(In open court.)

(377) By Mr. Yochelson:

Q. Answer the question. A. May I have the question again?

(Question read.)

(The Witness) The income that was available on the improved property, converted into an office building, was evident to me by the existence of a lease to a bulk tenant.

It was therefore, unnecessary for me to calculate what we might get in rent—the amount we might get from private individual tenants. This property was under lease.

(Mr. Liotta) I object. He is deviating from the very lease that they wanted to get into evidence.

(The Court) Yes.

(Mr. Yochelson) I did not understand Mr. Liotta's objection.

(The Court) He said he is deviating from the very lease that is in evidence.

(Mr. Yochelson) No, no. Confine your testimony to the lease. I think what he said is that he would not have to deviate, the Court please.

(The Court) Can't we first ask the witness on the property that existed as of January 18, 1963, what, in (378) his opinion, that property would rent for?

By Mr. Yochelson:

Q. That, in substance, is my question.

Mr. Kolb, you heard the Court's question. Can you please answer it? A. Yes.

In my opinion this property would have found a tenant at a rental in the amount of or in excess of the amount set forth in the lease agreement.

Q. What was that rental in the lease agreement?

(The Court) Wait just a moment, now.

Mr. Kolb, your appraisal was made in May of 1962?

(The Witness) Yes, Your Honor.

(The Court) Now, the property existing as of January 18, 1963, the date of the taking, can you tell the gentlemen of the jury what, in your opinion, that property would rent for?

(The Witness) As is?

(The Court) Yes.

(The Witness) I can move in that direction. I can give you, not out of my report, but out of my other knowledge of warehouse space—for that is the thing we (379) would be restricting ourselves to at this point. Such warehouse space in downtown Washington, on the edge of the Federal Triangle, surrounded by office buildings, would find users for warehouse space. So, even though that would not develop its highest and best use, it would be at the annual rate of approximately \$1.00 per square foot per year rental for each of the square footages within the building.

(Mr. Yochelson) Now, if the Court please, I should like the witness to proceed to testify with respect to the rental income from its prior use, to which he has testified.

(The Witness) There was a lease, a copy of which I have—made between the owners of the property in August, August 8 of 1962 for these two improved structures, improved by a warehouse, subject to the renovation.

By Mr. Yochelson:

Q. Excuse me, Mr. Kolb. Let me ask you whether or not this lease was a lease for all of the property, or just for the improved property? A. Only for the improved portion of it.

Q. It did not include— A. The parking lot, it did not.

(380) Q. Thank you. A. This lease was for a firm term of five years, to commence, the lease made in August, 1962 was to commence in May of 1963. We made our calculations upon the basis of the firm lease, not upon any renewals that might be involved or that might never come to be.

Among the things that the lessor was to furnish to the government included Janitorial services to the General Services Administration Standards: Maintaining the premises in good repair and tenable condition, to take care of mechanical plumbing and electrical systems; to paint exterior at the end of each three year term of occupancy.

Excluded from the lease and not the obligation of the ownership were all metered services, which metered services included a gas furnace to heat the building; excluded the government from responsibility to pay that; and it was the responsibility of the government to pay their own gas and water bills.

My note here is only as to who signed the lease.

In following through the income approach, we had first to try to seek what would be the proper capitalization, what does an owner of a piece of property have—what does he expect to get in return on his money?

My calculations brought me to the estimate that 9 per cent is that which an office building owner expects (381) to get from this type of building.

I estimated the economic life of the building to be fifty years, in its renovated condition.

Our justification for those rates is found in sales of office building properties in the downtown area.

We made—I made an income statement of the property. We know the rent to be \$388,000-\$388,902.92 per year. Even though there was no chance of the building being vacant, in the five-year period, in applying a proper appraisal technique, we should recognize the fact that sooner or later the building will become vacant.

For that reason, we have taken off 1 per cent in this downtown area for vacancy and creditors. We have taken off of the gross income three per cent to the real estate property manager.

Having deducted that amount of \$15,442 from the gross income, we now have an effective gross that is going to get into the owner's pocket to a degree of \$373,557.

I have rounded the five to a 500 figure and dropped off the \$57 of income.

There are certain fixed expenses, including real estate taxes which it was necessary to estimate because we do not

know what the real estate taxes will be, in fact, (382) upon this building yet to be converted, but we do know that which the real estate assessor says he would do and had done in other similar cases.

This brings us to a figure for taxes of \$35,000 a year.

The insurance we estimated on 80 per cent of its reproduction insurable value, on its actual value or insurable value, and we arrived at the figure for that of \$40,485, as a fixed expense or expenses that would occur each or every year.

The painting was to be done only every three years.

The operating expenses. It was the tenant's obligation to supply electricity, water, sewer and heating and cooling.

Therefore, the owner is not concerned with that. But he is concerned with the maintenance of the building.

I allowed a figure of \$4,000 per year to maintain the elevator; \$4,000 a year in addition to maintain the heating and cooling system.

It was the owner's responsibility to clean the building, supply the building, exterminate the building, and we allowed \$35,000 for that, which equates to \$0.34 a foot, which is in the form of what government buildings are costing to get this service according to the government (383) figures.

Repairs I put in there at 10 cents per square foot per year, bringing this to a \$10,000 figure.

Another operating expense, which is purely and simply miscellaneous, I have put in a cushion of \$4,500.

So, now, we have a total of fixed and operating expenses of \$97,985, which I say is \$98,000.

Taking that amount off of the income, we come to a figure to the owners of \$275,000 a year income, after they have discharged their obligations, and before giving them a return on their money and a return of their money, they want the interest rate and they want the dollar back.

It is a return. To this figure of \$275,000 we must add Parcel E and B in land. We had reached an estimate of a million one ninety two. We believe that the land is entitled to a 6 per cent return. This is now an additional charge of \$71,000 as an expense, leaving net imputable, the building therefor, is the rest of it. We have given the land six per cent, leaving imputable to the building \$203,000.

I judge from the history of office buildings in the downtown area that 9 per cent would be required by the owner, or he will not make the investment.

Capitalizing net income of \$203,000 at 9 per cent (384) reflects a figure of \$2,260,000, to which we now must add the value estimate of parcel A and Parcel B of \$1,192,000, bringing us under the income approach for the improved portion of parcel A and B only, to a figure of \$3,450,000, which relates to a rule of thumb check again in appraisal fields that that is 8.8 times, which is nearly 9 per cent, 8.8 times the annual revenue in that would come to the property in net.

Now, to that figure, to find out the total value now of A, B and C, of all of them, including the parking lot rented at approximately \$1,900 a month, but I did not think it was an investment at that but was a holding situation; adding all of the land into the value of the improved building brought me to a figure of \$4,257,000 as the entirety of it.

Then to come back and arrive at what is the value of the property then, in its present condition, we need take off of the figure we have arrived at the cost of getting the improvement, and we come to the final estimate not by mathematics, but by mathematics and judgment.

Does that answer your question?

By Mr. Yochelson:

Q. Mr. Kolb, what was your estimate or conclusion as to the cost of getting the building into this condition? (385)
A. A total cost of remodeling the building would be \$1,673,000.

Q. So this leaves you a value, after the expenditure, of how much? A. \$2,577,000.

Q. Was this then your ultimate conclusion of the value of this property, based upon this method? A. \$2,577,000—two million two is my final judgment.

Q. How did you reach that? A. Judgment and these processes that we have been through with checks and balances against similar properties which have sold, such as the Times Herald Building converted from a newspaper printing press to an office building.

I made that appraisal, as I mentioned earlier, for the government.

Q. Mr. Kolb, did you mean \$2 million two or \$3 million 2? A. Two million five. Did I say two million two?

Q. Yes, sir. A. Pardon me. \$2 million 5 is my final estimate.

Q. Does this method of valuation confirm or not your values or conclusion of value reached in other methods?

(Mr. Liotta) I renew my objection.

(386) (The Court) The objection will be overruled.

(The Witness) Mr. Yochelson, the only guides—there is no confirmation of one figure to another. It is not a mathematical procedure. We go through these steps and then we make up our own minds.

Each of these is just indicated or is an indicator. They are positive as to hope and belief.

Q. As I recall your testimony, using the land and reproducing value of the building less depreciation, you have reached what value? A. As an office building now, you are speaking? As an office building is my question?

Q. Your ultimate conclusion of value? A. As an office building.

Q. Yes. A. After remodeling, the value of the new or

renewed or converted office building with Parcel A and Parcel B and C of land, all of the 25,000 feet, was \$3,675,000.

Q. Now, go back to our value—your value. I think you said \$2 million 5, using the capitalization and return value.
A. Yes.

(387) Q. Does that include or does it not include the value of the adjoining parking lot? A. It includes A, B and C, all three pieces and the building in use—not in use—completed as a converted office building.

Q. Is it your judgment then that a knowledgeable buyer, willing but not compelled to pay, would have paid how much for this property on January 18? A. I think your question earlier got tied up with the same answer. I was giving it as a final judgment as \$2 million 5, as it was in January of 1963.

Based upon all the factors I have stated.

(Mr. Yochelson) You may inquire, Mr. Liotta.

CROSS EXAMINATION

By Mr. Liotta:

Q. Just to start off, Mr. Kolb, you realize, of course, that that value is \$1,577,000 more than what these people paid for the property ten months before it was taken? A. I believe that is the approximate figure.

Q. All right.

Now, when you were describing the trends in the area, Mr. Kolb, you mentioned the new trends of office (388) buildings, or the trend of office buildings, and you mentioned the PEPCO Building. A. Yes.

Q. May I ask you, sir, what is your estimate of the age of the PEPCO Building? A. I do not know. I would guess best at the age to be probably in the middle thirties.

Q. So that is about a '34 trend, is that right? A. I

do not understand the word "trend" in connection with 1930.

Q. It is thirty-three years from the date of taking. A. Since that building was built, yes.

Q. So that is not a recent trend, is it? A. I would want you to explain the word "trend," to me.

(The Court) Wait a moment. Maybe the Court can help.

You testified, did you not, using the PEPCO Building as being the trend?

(The Witness) Yes, Your Honor.

(The Court) That is what he is asking about.

(The Witness) I think I can move to the point.

The PEPCO was one of the first office buildings built in that area. The more recent built office buildings (389) have been built such as as late as 1962, early 1963.

I include all of them in my arriving at "Is this an office building area."

I was looking principally for office buildings that might be to the east of this.

So much of our construction has been to the west.

By Mr. Liotta:

Q. Would you let me ask you the questions. A. Yes.

Q. I will give you a chance to explain.

The Standard Oil Building is across the street from this Court House. A. Yes.

Q. How long would you say that building was there? A. I would remember the best—I recall it best as middle late thirties. That is my recollection.

Q. You also talked about the Munsey Trust Building, near the National Theater. Is that on 13th and 14th Street, around that area. A. Yes, sir.

Q. How long was that there? A. The mid '20's.

Q. Now, when you spoke of the Court House—were you (390) speaking of this building we are in now? A. Yes, sir.

Q. So, your trend included also government projects A. Yes, because they were influencing it.

Q. Federal Projects were influencing. A. Definitely.

Q. You do not distinguish between the needs of the United States or the needs of the District of Columbia and needs of the general market in the District of Columbia? A. Needs for what?

Q. Needs for buildings or needs for leasing. A. I cannot distinguish between the private need and government need because we are all in the same District of Columbia.

Q. Now, you mentioned the Accacia Building. Where is that? A. Indiana and Louisana Avenues.

Q. How long has that been there? A. I would remember that building being built in the mid-thirties.

Q. You mentioned the Letter Carriers Union; where is that? A. No. 100 Indiana Avenue.

Q. Is that up near Accacia? (391) A. Yes.

Q. The Teamsters Building is up near the Capitol, too? A. Yes, sir. It is about halfway between this building and the Capitol.

Q. The D. C. Municipal Building is right behind this one. A. Yes.

Q. How long has that been there? A. I remember that was built in the mid-thirties.

Q. And the Warner Building at 13th and E? A. Mid-thirties or possibly a little earlier.

Q. According to you, this trend had been taking place since 1930, is that right? A. No, the trend in the form that it has had, existed in 1960, 1961 and 1962, was quite

different than these buildings being built in the thirties. The Smith Building at 12th and E was a new addition.

The Pollin Building on Indiana Avenue and sixth was a new addition, just within the last year or before January of 1963. These were on the drawing board at that time.

Q. All right, sir. You made your appraisal in when of 1962? (392) A. May, April or May. I remember, I turned in my report about May 18.

Q. That was a report to find the fair market value. A. My estimate of the fair market value, yes, sir.

Q. Did you have any knowledge, yourself, or were you informed in any way that the Federal Government was going to condemn this property for the Federal Bureau of Investigation Building in May of 1962? A. Positive knowledge of it.

Q. You had positive knowledge of it? A. Yes.

Q. May of 1962? A. 1963. Mr. Liotta. I beg your pardon, 1962 is correct.

Q. 1962? A. Yes.

Q. May I see your report with the date on it, sir? A. Surely.

May 16, 1963. I beg your pardon. I was confused on that date as to the year. I made it after it become common knowledge that the Department of Justice was taking it.

(393) By Mr. Liotta:

Q. Then it was not May of 1962, is that right? A. It was May 16, 1963. I would appreciate it if you would let me correct it.

Q. Now, I believe you made a statement on direct examination that in your opinion this building could last for another hundred years, is that right? A. The statement I made was that the skeleton of concrete and steel could last another hundred years.

Q. Did you check the footings in the building? A. Did I check the footings? No.

Q. Have you ever heard of brick disintegrating over a period of years? A. Yes.

Q. Have you ever heard of steel losing its strength? A. Yes.

Q. Ever heard of electrical equipment wearing out? A. Yes.

Q. Ever heard of cement disintegrating? A. Yes.

Q. Have you ever heard of structural beams and walls deteriorating? A. Yes.

Q. How old would you say this building is? (394) A. Nineteen hundred—ten years before or afterwards. I think the back building was built around 1918 or 1916. The front building, in the 1890's.

Q. Is it your opinion, sir, that this building would be economically functional and physically functional for a period of another hundred years? A. Yes, and my opinion is sustained.

Q. Then in your capitalization approach were you being generous when you used fifty instead of one hundred years, Mr. Kolb? A. No.

Q. What was your opinion of the Merchantile—the Merchants Storage and Transfer people when they sold this property to this extent? Did you think they were uninformed? A. Are you asking me a question, do I think the Merchants Transfer Company was uninformed to sell it at the amount they did?

Q. Yes, sir. A. Definitely.

Q. Did you ever trouble yourself to talk to the people in the Merchants, Mr. Newbold, to find out what he thought about this property? A. No, indeed. Obviously he thought it was a good sale or he would not have made it.

(395) Q. In your opinion, he was uninformed. A. Yes, sir.

Q. Do you happen to know who is on the Board of Directors of the Merchants Transfer and Storage Company?

(Mr. Yochelson) Objection.

(The Witness) I do not.

By Mr. Liotta:

Q. Do you know Mr. Thornton Owens? A. Very well.

Q. What is your opinion of his appraisal of—of his ability as an appraiser?

(Mr. Yochelson) Objection.

(The Court) Sustained.

By Mr. Liotta:

Q. Mr. Owens is an appraiser in Washington, is he not?
A. yes.

Q. Would you have a different opinion of the knowledge held by the owners when they sold this property—the Merchants—when they sold the property if you knew they were advised by Mr. Owens—

(Mr. Yochelson) Object.

(396) (The Court) The witness can answer that question.

(The Witness) Let me be sure that I understand, if I may.

Would I have a different opinion of Thornton Owens if I had known that he had advised his clients to accept this amount of money?

By Mr. Liotta:

Q. Advised his clients that \$1 million was the worth of the property? A. Would I change my opinion of Thornton Owens? Not an iota.

Q. As to the owners whether they they were informed or uninformed is the question. A. I think the owners were uninformed when they made that decision.

Whether Thornton Owens made the decision for them, I do not know. I doubt it.

Q. 933 D Street, you mentioned such a sale. A. Yes.

Q. Were you informed or did you trouble yourself to find out as to the terms of that sale—and both of them? A. 933 D. That was the sale of 30 by 100 and 187 feet. The first sale was at \$20.58 under an agreement of June of 1962.

The resale was in the last week of November, 1962, (397) Settlement February 4, 1963 at \$43.00.

The owner of this property told me that he paid cash for it. He told me he would send to me a photostatic copy of the settlement statement and of his contract.

Q. Which owner? A. Eric Baer.

Q. He said he paid cash? A. Yes.

Q. Did you check the land records to find out and check his story? A. The land records had already indicated that to me—not that it was a cash sale—but a sale equivalent to a cash sale, if not. I do not have documents of the financing. If the financing had been such as 90 per cent, I would have questioned that very quickly.

Q. When the first sale was made by Robert Nash, how much was the property sold for? A. The first sale by Robert Nash was \$22.58 a square foot, under contract of June of 1962.

Q. How much in cash? A. \$100,000.

Q. In cash? A. Oh, in cash? I beg your pardon. No, sir. I (398) do not know that.

Q. So you do not know what trust was involved in that particular sale? A. I know that trust was a conventional one or I would have questioned it.

Q. Did you question to find out whether there was a deferred purchase money trust on that property? A. I am certain I did inquire into it. Whether or not it was

a trust to be placed or Nash was to take it back. It would be in character for Mr. Nash to take the trust back.

Q. That was how much, \$100,000? A. Yes, that is my figure.

Q. Now, the resale—the closing, did it take place the same day by any chance, did you check? A. Are you talking about the first and second?

Q. Both. A. No. The June of 1962 contract was settled on January 22, 1963. The November, 1962 contract was settled February 4 of 1963.

Q. In the second sale, sir, may I ask you, did you know there was a deferred purchase money trust on that property, or is that the one you said Mr. Baer told you he paid cash for? (399) A. That is the one Mr. Baer told me he paid all cash for.

(Mr. Liotta) May I have your indulgence just a moment?

(The Court) Certainly.

(Pause)

(Mr. Liotta) I am sorry, I mislaid something here, Your Honor.

(The Court) Do you want a few minutes?

(Mr. Liotta) Yes, sir, if I could.

(The Court) You can take a few minutes, gentlemen of the jury.

(Short recess.)

By Mr. Liotta:

Q. Prior to the recess, Mr. Kolb, I was asking you about 933 D Street. Let me ask you—between the recess and just now, did you ever confer with anyone about this sale. A. This sale was not discussed in the recess.

Q. Now, would it change your opinion as to the effect of this sale if you knew that in the first sale from Robert S. Nash to Norman H. Zipkin, there was a deferred pur-

chase money trust of \$9,000 at 6 per cent for ten years? Would that change your opinion as to that part of the sale and the weight you gave to it? (400) A. Mr. Liotta, do you mean 9,000?

Q. Ninety. A. \$90,000.

Q. Yes. A. It very possibly could. Because that is now 90 per cent financing.

Q. Now, would it change your opinion of the value as to this resale of the property from Norman Zipkin to Meyer and Baer if you were informed that there was a deferred purchase money trust as to that portion of the \$80,500 at 6 per cent due 1968, and assumes a balance of \$90,000 first trust, would that change your opinion as to that portion? A. You have a total of \$170,000 in financing?

Q. Yes, sir. A. Of a total sale of \$200,000? No, it would not at this point.

Q. It would not at that point. A. Not on a second trust.

Q. Do you know Mr. Robert Nash? A. For thirty-odd years.

Q. Let me ask you this: Mr. Robert Nash, in your opinion, is an educated—an informed man? A. Yes.

(401) Q. He is involved in a lot of real estate transactions, is he not? A. That is correct.

Q. He contracted to sell this property when, according to you? A. June, 1962.

Q. And then Zipkin contracted to sell it to Morse, when? A. The last week in November of 1962.

Q. So that is June, July, August, September, October, November. A. Yes.

Q. Two contracts. A. Yes.

Q. Now, do you think that on the evidence you have before you that that sale by Mr. Nash to Mr. Zipkin was by an uninformed Mr. Nash? A. I do not believe Mr.

Nash is uninformed. But I do believe that Mr. Nash's financial circumstances are such that he would have to be looking at the internal revenue picture every minute of the time to see when it would be best for him to get out. Not that he would not want the last dollar. He is intelligent.

(402) Q. He would not give away \$90,000, would he? A. Not in my opinion, except to charity.

Q. Then was that sale ever, in your mind, suspect as a comparable? Did you ever feel that there was something more than just a straight \$190,000 sale?

Q. Didn't you ever check the records to find these trusts? A. I did.

Q. You did not find them? A. I did not say that.

I said that, if these trusts, and particularly when we get up to the last sale, were to show me that the purchaser had paid a premium price to obtain financing, yes, I would be suspect. But there was enough cash involved in this from the record to substantiate that.

Mr. Baer told me that he paid cash—period.

Q. Was Mr. Baer trying to assemble some property? A. I do not have any knowledge of that.

Q. Doesn't that make a difference when you start examining a sale to find out if they are trying to assemble property or not? A. I do not have any recollection of any adjoining property being in the name of Meyer and Baer.

Q. How much did the subject property sell for per (403) square foot? A. The last sale.

Q. I am talking from the sale of Merchants Transfer and Storage to Dicker and Lawrence? A. I am sorry. I thought you were talking about D Street. About \$35 per square foot. It is 35,000 square feet.

I am quite serious when I say I do not have a recollection of the exact amount. But \$35.00.

Q. Now, you talked about lot 808 and lot 809 in square 348. A. Yes.

Q. Would you go to that board over there with His Honor's permission. A. (Witness complies.)

The square again?

Q. 348. Square 808 and 809. A. 348. I have it.

Q. I am talking about lots 808 and 809, 411 and 413—11th Street. A. I have it.

Q. One, may I ask what the depth of those lots is. A. 100 feet.

(404) Q. The depth of the front property on E Street here, the subject property, is how much? A. 88 or so.

Q. No, sir. You misunderstand me. What is the approximate depth of the parcel A here in the subject property—how much? A. Is it possible to lift this up?

Q. Here is a pointer over here. A. It is not a question of that. The tape is covering it.

Q. Look at this exhibit here. This is a larger drawing. A. All right. 110 or 115 feet, roughly.

Q. Deep. A. The frontage. Are you asking the frontage?

Q. I am asking about the depth? A. The depth.

Q. Yes. A. 187.87.

Q. Now, were there any improvements on that property on 11th Street that you know of when it was sold? A. Now, you are referring to Square 347?

Q. 348? (405) A. 348.

Q. That is right. 348. Lots 808 and 809. The ones you testified to. Is it 348? A. Yes, sir. I believe we are talking about 413 and 415—11th Street.

Q. 411 and 413—11th Street. A. Yes.

Q. Didn't that have retail stores on it? A. No.

Q. Isn't it a fact that is part of the assembly of Mr. Brylawski? A. If it is, I am not aware of it.

Q. Let me ask you this. Please resume the witness stand. May I remain at the stand?

(The Court) Yes, sir.

By Mr. Liotta:

Q. How do you compare 11th Street with E Street—where this property is—the subject property? A. The block between Pennsylvania Avenue and E Street, on the east side of 11th Street, in my opinion, opens the loading platform of the Evening Star Building and has been for an extended period of time, with the entire takeup of the area as a transportation center for Maryland, (406) Virginia and the District of Columbia buses along that entire side of that street, has brought about a high degree of vehicular congestion, and the shops that have been in that street have been tobacco shops, newspaper shops, magazine shops—not shops of top flight character.

The nas to the 900 block of E Street, where subject property is located, on the south side we have, among other things on that side of the street, some rather indifferent shops—a pawnbroker shop is there; the Houston Hotel is there next door to it; several parking lots that are in a transition stage.

In through there, across the street will be the office furniture building, Ginn Company, and Stott are in that area.

The influence of the Potomac Electric Power Company building bears very favorably upon it.

The width of this street as a through street to Union Station through the Court House Area into Pennsylvania Avenue gives it, in my opinion, far and away the better location than is the east side of 11th Street, below E.

Q. Better than that location? A. In my opinion for those reasons.

Q. The PEPCO Building has been influencing that (407) property for about thirty years or better? A. Are you asking if PEPCO has been influencing the subject property?

Q. Yes. A. Yes.

Q. Those stores—how did you describe them—of those properties in the subject square? You just described them as unimpressive. A. That is right. There is a pawnbroker shop in there a couple of fairly good restaurants. Not exclusive restaurants. Across the street among others is Adam Weschler Auction House.

Q. So that in effect then you gave credence to this sale of Mr. Brylawski at \$44-some odd a square foot, and you threw out the sale of the subject property, itself; right? A. I was not comparing such property with subject property. I have to compare subject property with other sales.

I am seeking what the market would do, not what this of what the market will do. Not what one sale will do. particular property would do but what other purchasers will pay. That is the thing that leads me to an estimate I cannot compare one thing to it.

Q. Now, you mentioned the Safeway Sale, Columbia-Palace Safeway sale. (408) A. Yes.

Q. Would you kindly point out where that is on that plat? A. I will. The Columbia Palace sale was 110 F Street, Northwest. It is lot 810 in Square 321.

(The Court) Mr. Kolb, if you step over to the side, the jury will have a better opportunity to see what you are pointing at.

(The Witness) I am sorry, Your Honor.

By Mr. Liotta:

Q. So, it is on what street—F Street? A. This is 11th Street, this is F Street. The orientation lists the big Woodward and Lothrop's Store Building, catercornered from a discount store and parking building opposite it.

The property, 819, is in this location (indicating) the old Columbia Theater movie house.

Q. It does go through there to 12th or 11th, does it not?
A. No, not this sale does not. It is irregular in shape. It was 50 by 110. It did not go back to an alley, contained 7309 square feet.

Are you speaking of an assembly?

Q. Where is this property again—right here?

Q. You are pointing to the corner. This property (409) I am referring to is not a corner property. It is No. 1110—F Street.

Q. It also goes through to 12th Street. A. According to this you are showing that it does. The portion that was sold did not.

Q. So you only took part of it. A. That is not true. I took all of the sale.

Q. That sale was made in November, 1962. Was that improved when sold? A. That was made September of 1961.

Q. What would you say as to the locale of F Street and 11th in comparison with the subject property—and that sale; is it better, equal, or not as good? A. You are asking me to compare the F Street property in the 1100 block. Then I sensed you said something about 11th Street.

Q. I am talking about the particular sale, the Safeway sale, and ask this question:

Was it better than the subject as far as location; equal to, or not as good as this property? A. This property on F Street is superior.

Q. Superior.

Now, that sale was made in—when, 1961— (410) September of 1961? A. Yes.

Q. Let me ask you this:

You had used as a general statement that when you examined comparable sales, you used an adjustment of 10 to 15 per cent in this area. A. Yes.

Q. Would you kindly tell me what fifteen per cent of one million dollars would be? A. Let us correct the record, sir, first. Because, if I said that, I want to now retract it. Because I am not mindful of having said it. There was an adjustment of ten to fifteen per cent. I think you are relating to a conversation having to do with the Smith Building at 12th and E as to corner influence.

Q. Let us get to that Smith Building at 12th and E.

(Mr. Yochelson) May the witness resume the stand?

(The Court) Yes.

Are you through—

(Mr. Liotta) There will be some I will have him point out.

(Mr. Yochelson) I am sorry.

(411) By Mr. Liotta:

Q. Would you point that out on the plat, the 12th and E Street sale—the Smith sale? A. Except for the fact this does not go to 12th on the east side.

Q. Will you resume the stand. A. Yes.

Q. I will ask you another question. A. No, neither does that—(indicating).

Q. Now, that sale took place in January of 1962. A. That sale being 1201 E Street—the Smith sale.

Q. That was \$75 a square foot. A. Yes.

Q. As a matter of fact, the sale of the subject property was settled one month later, is not that right? March of 1962. A. In that area; yes, sir.

Q. March 12, 1962. A. In that area.

Q. Wouldn't that indicate to you as an appraiser that

perhaps the subject property was worth that much less than the 12th and E Street property. A. I am trying to gauge what you mean by "that much less."

(412) Q. Well, one sale took place for \$75 a square foot, according to your calculations this million dollar sale was about \$35 a square foot. Doesn't that give you on indicia of what is happening here? A. It indicates to me, as I have said before, that Smith paid that which the market made him pay. It indicates to me that when the purchasers of Merchants Transfer paid \$35, the seller made the mistake. I think the record of surrounding sales establishes this, even of parcels of land in 2, 3 and 4 thousand feet, or six and seven thousand feet. There is a '61 sale of the F Street at \$54 in 1961, would likely be more than \$100 sale today, so we must add to or adjust to that which has happened in the interim.

Q. All right.

You are making a statement now as to the sales and your examination of the sales.

Let me ask you this, sir. Were you familiar with a sale of 513—9th Street, made on July 15, 1959, between Washington Theater Company, Inc., to Ruth E. Angelo, and later transferred to the Lansburg Company—are you familiar with that sale? A. Did you say 519.

Q. 513—9th Street. (413) A. I am familiar with every sale that has taken place in the area that received examination by me. I will preface it that way.

Whether I documented it is different. I do not have 519—9th Street.

Q. I said 513—9th. A. Or 513, either.

Q. Let use get to 517—9th Street which is lot 803 in square 406. A. Yes, sir.

Q. It sold to Angelo for Lansburg's. What was the price of that? A. November of 1959, the 4271 feet with a fifty foot frontage sold for \$21 a foot.

Q. You say you examined these sales. What effect did those have on you? A. Substantial—in bringing me to a conclusion—as I have noted here on my record. This sale I have recited to “shown to indicate change in the 1959 to 1963 market.”

Q. Why didn't you tell us about that when you were testifying before? A. I have not testified on all of my comparables.

Q. Let us go to the next one.

(414) Are you familiar with the sale of 701 to 725—9th Street, from Service Marketing Inc. to Jack Geller, Norman, Harry and Hildegarb in December of 1962?

30,613 square feet, being 701, 725—9th Street, lots 830, 832, 805, 807, square 405, sold in 1962, December at \$20.41 a square foot. Are you familiar with that? A. I do not have the documentation—I do not have it documented but I have a clear memory on that which you say is the situation. This is the corner of 9th and G Place, southwest corner, occupied by a parking lot.

Q. It went on through to 8th Street, did it not? A. And we are not talking about the same piece of property now.

Q. Then you are not familiar with the sale I am talking about. A. The sale I am talking about is the southwest corner of 9th and G. The sale might be that you are thinking of the old Bialto Theater site. Is that it?

Q. It is lots 830, 832— A. I do not think you will find it there.

Q. Square 405, right here (indicating). I am pointing to it now, next to the Security Building.

Do you recognize that sale up there?

Q. Yes, I remember it.

(415) Q. Why didn't you tell us about that one? A. I was not asked about it.

Q. You were asked to give the sales which you considered comparable when you testified; were you not? A. I was asked to give some of the sales that I used as background. I have documented here for my own purposes a total of 38 sales.

Q. You testified that the Raleigh Hotel had some degree of comparability. Did this sale have any degree of comparability in your opinion that I have just mentioned? A. Definitely.

As I said earlier today, all of these sales have influence and can be adjusted—area, frontage, time, location.

Q. Your final valuation for the land ran from \$55 to \$60 a foot. A. Yes.

Q. Without improvements? A. Yes.

Q. What is it with the improvements? A. I have testified as to my final estimate of value as 2.5 million dollars for the entire area.

Q. How much is that per square foot? A. I can figure it out.

(416) Q. Would you, please? A. It is going to take some doing. Only because of the fact we have a number of numerals in here to be divided as to parcels, A, B and C.

Q. Then just hold that until our next recess. A. All right.

Q. Were you familiar with a sale of Lot 32 in Square 375, being a sale from Benjamin W. Guy to Dorothy Mathews, November 21, 1962—are you familiar with that sale of 704-06 9th Street, the west side of 9th Street, 2508 square feet, \$20 a square foot? Are you familiar with that sale? A. Yes, I remember that, but I have not documented it.

Q. You have not documented it. A. There were too many sales—much closer in that we could use as to influence without going several blocks away.

Q. You went right past the subject property, did you not? A. You say I went right past.

Q. You said there were sales closer in. Is there anything closer than the subject property? A. Obviously nothing closer than the subject property to the subject property. But in the appraisal field, you can (417) not compare one thing to itself. You will never get a conclusion.

Q. Are you stating that, in your appraisal manuals and your appraisal process, you do not consider the sale of the same property? A. That is correct. You do consider it but not as being influencing on the market. A market is not made by one sale.

Q. Is that in one of your appraisal books? A. Is that in one of my appraisal books? Definitely. It is in every one of the appraisal books. It is the definition of the fair market value that you must find the value not in one sale, but in a series of sales, the fair market value.

Q. And not the sale of the subject property, particularly. A. That is correct. If we were to say that, then the sale price of a piece of property would never change. It would always stay at X dollars.

Q. But a recent sale of the subject property within a short period of time of the date of your appraisal, are you now stating that has no effect in so far as you are concerned in your appraisal? (418) A. I can state that when you ask me in addition to it in fairness to the question—is there fair market value based upon the sale—the answer is no. The market value is found in the market place.

Q. Did you consider lot 813 in Square 375 sale which was part of the first assembly—Richard Cope to Doggett, November 30, 1962, at \$23.34 a square foot? Did you consider that sale? A. Where is it located?

Q. Lot 813, square 375. A. Tell me where it is located.

Q. Sir, you will have to figure that out—lot 813 in square 375. I will tell you where it is. It is on— A. Is it a vacant lot?

Q. It is on 9th Street. I am pointing to it. It is part of the Doggett Parking lot situation. A. I see. And the address, sir? I listed them by address.

Q. 712 and 714. A. A moment ago I was referring to this sale when I was mixed up with your 30,000 foot sale across the street at \$20 back in 1961 or 1962. I was speaking of 9th and G Place, which is the sale that you are now (419) referring to. Are you asking am I familiar with it?

Q. Yes. A. Yes.

Q. This sale of 30,00 square feet across the street was in December of 1962? A. I do not have a documentation on that. I am sure your records are right.

Q. That is pretty close to the same size as the subject; is it not? A. That is right. It is an excellent site. Not as well located.

Q. Right in the same square, square 378, did you take into consideration the sale from George C. Gogas and Basil C. Gogas to Sylvan Herrman, Charles Stein and Samuel Blanken on April 30, 1962, \$190,000—\$35.66 per square foot? A. Located where?

Q. Pardon? A. Where is it located?

Q. 407 to 409—10th Street. A. I have that documented.

Q. Now, that was \$35-some odd a square foot. A. \$35.66 square foot, April, 1962.

Q. Does 10th Street—how does that compare with the location of the subject property in your opinion? (420) A. Let me answer it—I am sorry. The location of 10th Street in this block, and the 900 block of E Street have elements that can be compared. 10th Street is a one-way street, southbound. E Street is a two-way street.

E Street is a very wide street; 10th is a very narrow street. The properties in the 400 block of 10th Street have never "caught fire" for several reasons, possibly one is that you have in the west side a large electric generating plant that gives off some noise—nothing too difficult. The shops

along that street have been successful shops but not particularly good shops. The best thing there probably is the Ford Theater and the Abraham Lincoln House. But that has not been highly commercially developed as the 900 block of E has. It suffers also—I was about to say it does not have an alley but it does. It suffers also from its area compared to the 35,000 feet. It has 5,300 feet.

Q. Well, according to you then, sir, isn't everything suffering in this area except the Raleigh Hotel and 12th and E? A. No. Definitely not. This sale was in April of 1962, the sale of January of 1963. You have a year's difference in time which must be adjusted for.

(421) Q. How about the two months' difference in time on the property up here on 9th and G Street—the 30,000 square feet of land that sold for \$20-some odd a square foot? What about that? A. Are you asking in my opinion what that might sell for today?

Q. No. I am not asking you that at all.

(The Court) Well, the court is interested in what it would have sold for in January of 1963.

By Mr. Liotta:

Q. What adjustment would you make on that? A. It would be between \$45 and \$55. I have not judged this 30,000 feet that much. It has many advantages that it does go from 9th to 10th Street. I believe that 9th Street has not had the acceptance in the last 20 years that the area closer into 10th and E has had. It has been a rough neighborhood.

(The Court) Mr. Kolb, just a moment. See if the Court understands it. It was sold when?

A. 1961 or 1962.

(The Court) Mr. Liotta.

(Mr. Liotta) December, 1962.

(The Court) Did you understand that?

(422) (The Witness) I had not understood that.

(The Court) The question is, between December of 1962 and January of 1963—

(The Witness) A period of one month.

(The Court) Yes.

(The Witness) I do not think there would be more than a change of a few per cent, three or four, or five per cent in a month's period of time. I thought that it was a 1961 sale. I did not have that one documented although I did see the sale. I thought it was 1961.

By Mr. Liotta:

Q. Are you familiar with the sale 512 - 11th Street, Lot 19, square 321, American Security and Trust Company, to William H. Guyer, et al, Trustees, September 27, 1961, \$140,000, \$36.84 a square foot? Are you familiar with that one? A. I am.

Q. That is closer to F than this property, is it not? A. Yes.

Q. Isn't F Street a better property than E in your opinion? A. Yes.

Q. Are you familiar with the sale of 1110 F, lot 819, Square 321? That is one that you quoted—Columbia (423) Palace Corporation? A. Yes.

Q. And Safeway Stores, Inc.? A. Yes.

Q. \$54.72 a square foot. A. In 1961.

Q. What is your opinion of F Street? Isn't that better than the subject property? A. Definitely.

Q. Isn't that the one that is L-shaped with a 36 foot frontage of 12th Street? A. I do not recall it having the frontage on 12th that you speak of.

Q. If it did have a frontage on 12th Street in your comparison with the subject property would you adjust differently than you have? A. Definitely. A double street frontage would add additional value.

Q. Do you have your records there to indicate what lots were involved in your sale? A. I have it as lot 819 only.

Q. Were you aware, sir, that 513 - 12th Street, part (424) of 820 in square 321, which was part of an assemblage of the particular piece of property you are talking about, was sold by deed dated September 31, 1962, and sold for \$50 a square foot? Were you aware of that? A. I am.

Q. Isn't that where they get their 12th Street frontage? A. It is a different sale. There are two sales. We have recited both, but individually, because there were two sales.

Q. Now, were you aware of a sale from Jerome B. Mills to Louis Zions of 901 to 903 E Street and 504 - 9th Streets being lots 801 and 805 and—which is the northwest corner of 9th and E Streets, a sale dated May 23, 1960, \$185,000—withdraw that. \$150,000 or \$20.55 a square foot improvements, were you aware of that? A. Did you say "D" or "E"?

Q. 901 to 903 E Street, 504 - 9th Street, diagonally across the street from the subject property (right there—indicating). A. I am sure I reviewed it but I have not documented it. What year might it have been?

Q. May 23, 1960, including improvements, \$20.55 a square foot. (425) A. I can see why I did not document it, possibly.

Q. Tell me why. A. It was a 1960 sale. When we had sales much closer in time, requiring, therefore considerable less adjustment, you had \$40 sales. Why go back and pick up \$15 sales by going back another ten years.

Q. You went back to September of 1961. A. In what instance?

Q. The Safeway sale. A. I did, but not 1960.

Q. You took the 1962 sale on 12th and E. A. I did. We are talking within a period of a month now and not a period of three years.

Q. The same as the subject property—the period of a month or two. A. Yes.

Q. Were you familiar with the sale of 504 - 9th Street, say, Sadak to Lujak, Inc., September 21, 1961, which is part of the same assemblage up there of Zions, apparently? Were you familiar with that sale? A. No, but I would have a recollection of the sale at that time with about—which was about \$20 or \$22. There wasn't a sale I did not review in that area.

Q. Were you familiar with the sale southwest corner of (426) 10th and E Streets—the Evening Star Newspaper Company, inc., November 5, 1958, and included a three-story parking garage, \$47.98 per square foot. Did you consider that? A. I remember it was a three story parking building. Was that not back in 1958?

Q. 1958. A. I did not feel as though we had to reach that far back for comparables.

Q. How far did you decide you were going to reach? A. As far as I needed only. If I could find sales in abundance, that would make up my mind in 12 months, I would have stopped in 12 months.

If it took reviewing of 24 months, I would go back 24 months. I certainly would not go back to 1958. But even if we do, we find that sale to be at the rate of \$49 a foot.

Q. Did you know of the sale of an eight story office building, 928-930, Lot 823, Square 377, Georges Radio and TV Company to Allen H. Saturn, September 24, 1962, \$350,000, \$44.49 per square foot, including improvements? Did you know of that sale? A. I am sure I reviewed it, but I did not document it. There was nothing in a building of that character that could compare to a building this size.

(427) That is a small office building, Mr. Liotta.

Q. Are you familiar with the sale 1317 to 21 8th Street, Northwest, a six story building and printing plant of the former Times Herald? You have mentioned that once, yourself. A. Yes.

Q. Were you familiar with the fact that the property sold April 6, 1961, including improvements for \$31.30 per square foot? A. Yes. I think that is correct.

Q. That is one you had? A. Yes.

Q. That is one that you had considered, yourself? A. Yes. GSA engaged me to make that appraisal for them preparatory to taking a lease on it. At that time the value was quite different that \$31.

(Mr. Liotta) Your Honor, I ask that that be stricken.

(The Court) No.

You may proceed.

By Mr. Liotta:

Q. Mr. Kolb, are you familiar with 511 - 11th Street? That is lot 89, square 347, improved by a seven story loft building, National Republican Publishing Company to Josephine Bell, September 6, 1961, \$68,000 or (428) \$28.60 including improvements? A. Do I know of it? Yes, I do. I made the appraisal on that property for the Estate or ownership.

Q. Are you familiar with it? A. Yes.

Q. Does that in any way indicate any type of comparison to the subject property? A. To this property, no, sir. Not in the slightest. If you want me to tell you why, I will.

Q. Let me ask you something else. You say none of those sales are comparable. What was the improvement on 933 D Street when it was sold? A. 933 D?

Q. Yes. A. We are talking about the same thing. A very, very beat-up three story paper storage building.

Q. Those are the ones that you were not aware of the purchase money trusts? A. No. I would not say that. I said I had not documented them.

Q. You had mentioned Raleigh Hotel—that sale to Hamilton Properties, Inc. A. No. I mentioned Raleigh Hotel sale but did not give documentation as to buyer, seller or amount.

(429) Q. Did you not say that was capable of comparison?
A. Definitely. That I did say.

Q. Would you tell me, sir, are you aware of the property and the sale of the Hamilton Properties—from the Raleigh Hotel. A. Yes. If you are talking about the contract of April 6, 1962.

Q. I am talking about the ones in 1962. A. All right.

Q. The sale dated May 25, 1962.

Do you know whether or not that sale was a sale and including the business, restaurant, bar equipment, all the records, good will and everything in the hotel—do you know whether that was correct? A. I do not know that. I do know this—I am sorry, Your Honor.

(The Court) You did not.

(The Witness) No, I did not know it included those things.

By Mr. Liotta:

Q. If you knew that was involved in the sale mentioned on the deed, would that, in any way, prevent you from considering that in any way comparable aside from location in your opinion? (430) A. Not a bit, for the reason that that and every bit of that which you spoke of has been hauled away.

Q. At that time it was sold as a going hotel, was it not?
A. I had no reason to inquire as to how going it was. It went as a hotel. It could not live economically, or it would have stayed.

Q. Did you compare—

(The Court) Wait just a minute. Come up here, gentlemen.

(431) (At the Bench.)

(The Court) The Court does not want to make any remark. But that statement that he just made applies to

Merchants—that if the building was not obsolete, they would not have moved out.

(Mr. Yochelson) In the one case it was torn down, and the other it is not.

(The Court) Raleigh was sold as a going concern, the first sale.

(Mr. Bernstein) Yes.

(The Court) The point is—

(Mr. Bernstein) That was only permitted to operate as a hotel in the interim operation.

(Mr. Liotta) I can't hear you.

(Mr. Bernstein) In the interim, it was turned down.

(The Court) He opens the field now to why would Merchants move out if it was not obsolete?

(Mr. Yochelson) I think Mr. Liotta can certainly ask him that question.

(The Court) All right.

(432) (In Open Court)

By Mr. Liotta:

Q. By the same token, let me ask you this: Why would the Merchants Storage and Transfer Company move out of the subject property if it was not obsolete? A. I do not know the reason. I have cause to believe why they moved out, because of the type of warehousing that they went into outside of the city. They wanted to change their mode of operation to a degree.

Q. Mr. Kolb, what is good for one piece of property in the way of theory in your opinion, should be good for another piece of property by way of theory, am I right?

You were theorizing as to the Raleigh Hotel. Now, I ask you to theorize as to the Merchants Storage and Transfer Company. A. In what connection?

Q. In connection with the question that I just asked you.
A. Why Merchants went out of business?

Q. Yes. A. I do not know.

Q. And you do not know anything about the Hamilton Properties, either? A. I know what I see from the record, but whether or (433) not furniture was included, I do not know.

Q. But you also saw the record as to the Merchants Storage and Transfer Company sale, did you not? A. I did.

Q. So you know what is on the record there, too? A. Yes.

Q. Is it your statement, sir, that Pennsylvania Avenue where the Raleigh Hotel is located, is comparable to the subject property—is that your statement? A. My statement was that it has elements of comparability and it can be compared. It is a matter of a block and a half away. All sales in that area—within a block and a half should be used as a basis of comparison.

One influences the other.

Q. Including 10th and E? A. Are you talking about the parking garage building?

Q. Yes. A. Of course.

Q. How about the sale of the Apex Liquor Store property—are you familiar with that one? A. Not as the Apex Liquor Store property. What is the address?

Q. Bear with me a moment, please. A. Are you speaking now of the property being on Pennsylvania Avenue?

(434) Q. Apex Liquors was on Pennsylvania Avenue, 631 to 633 Pennsylvania Avenue. A. I did not use Pennsylvania Avenue comparables, although I did review them.

Q. Well, to an extent you considered the Raleigh Hotel? A. Yes. It is also on 12th Street, primarily on 12th Street.

Q. Just so we understand each other. I am talking about this liquor store. Do you know where it is. A. Yes, I know

this one. You are talking about 10th and Pennsylvania Avenue.

Q. No, that is not 10th and Pennsylvania. A. 631 to 633 Pennsylvania Avenue. I beg your pardon.

Q. So, if you are going to the Raleigh hotel, to look at Pennsylvania Avenue, why did you not go the other way and look at the Apex Liquor Store and see what that sold for? A. I am sure I did. The fact that I have not documented it, does not say that I did not consider it.

Q. Just what do you mean by "documented." A. Put it here in my report. I have 38 sales in there.

(435) Q. If it is not in your report, it is not documented? A. Right.

Q. Is this sale in your report? A. No. I did not use any Pennsylvania Avenue sales in my documentation.

Q. Turning your attention to your reproduction cost, you had indicated that you took a ten per cent depreciation factor; is that right? A. As a warehouse, yes.

Q. We are talking as a warehouse, but I am talking about the building. You depreciated the building ten per cent, is not that correct? A. Yes, as a warehouse.

Q. On the basis of ten per cent, using your reproduction method, you would estimate then—or aren't you estimating—the basis of a hundred years, aren't you estimating that building had a ten year life? A. No.

Q. No. Your ten per cent includes functional, economic and physical depreciation; right? A. Yes.

Q. Mr. Kolb, you had stated that you appraised (436) many, many houses in Foggy Bottom and in Southwest Washington. A. Yes.

Q. Now, in houses over 60 years old, generally, did you ever estimate any less than 40 per cent depreciation?

(Mr. Yochelson) I submit this is not a proper question. Object.

(The Court) Is it relevant?

(Mr. Liotta) I think it goes to his credibility.

(The Court) We are going into an entirely different part. The Court feels that the objection should be sustained.

By Mr. Liotta:

Q. You had also made the statement that in your opinion this property, the front property could be made new for \$74,000; right? A. As a warehouse.

Q. New? A. \$74,000—what you refer to is the depreciation of ten per cent that you were referring to. The depreciation that is being referred to is accrued depreciation, from back there up to today. Not something from today to a hundred years hence. It is that which the building needs to bring it up to economic maximum income potential. For (437) instance, if we found out the roof has been on fifteen years, we know the roof normally might last forty years. We must lay aside some money to replace it.

The same with the electrical and plumbing system. This is the worn-out portion of it. That has already happened. Nothing in the future economic life. Only the physical depreciation, just as I have lost some of my hair, the building has lost some of its good parts.

Q. Mr. Kolb, for the purpose of that method, you assumed the reproduction cost new of the building, did you not? A. I did not assume the depreciation. I calculated—

Q. I did not ask you that. A. That is the only way I could answer you.

Q. I asked you, Mr. Kolb, for the purposes of this method of appraisal, you first estimated the reproduction cost new of the front building, did you not? A. Yes.

Q. What was your estimate of the reproduction cost new of the front building? A. \$741,392.00.

Q. And then you were asked by counsel, including all elements of depreciation, physical, economic, functional—

what your estimate was, and you said ten per cent did you not? (438) A. Yes.

Q. So that you took your figure for the new amount—that is a new building you are building on your reproduction and you deducted ten per cent depreciation? A. Yes.

Q. So that, in effect, aren't you saying, just as you did say, that you can make this building new for \$74,000? A. New, yes. In the sense that it would be capable of bringing in its maximum rent as a warehouse.

Q. Mr. Kolb, you did not say that on direct examination, did you? Did you or did you not? A. Did I use those words? No. I do not think I did. But they are meant. They are inferred.

Q. Are you now estimating this property would have a greater physical depreciation than what you originally had— A. I do not now say so. I say the accrued physical depreciation from some time in the past to the date of January, 1963 was ten per cent—as a warehouse.

Q. So, after deducting 10 per cent of your reproduction cost new, you arrived at what your estimate was of the depreciated reproduction cost of the building; isn't that right? (439) A. That is correct.

Q. So, you estimated then, if it would cost seven hundred and some thousand dollars to build it January 18, 1963, in its present condition—and brick by brick and piece by piece it was worth only ten per cent less than a new building; isn't that what you are saying? A. That is correct. In its form, as it existed.

Q. You are not —strike that.

Your total value for the land using the reproduction method was how much, sir? A. You asked the question, the total value of the land, using the reproduction method?

Q. Yes, sir. A. Actually we did not use the reproduction method in arriving at an estimate.

Q. You understand me, don't you?

In using reproduction, you add on your land value to the value of the building, that is what I am talking about, sir.

A. Oh, all right, yes.

Q. You come up with a total value of what? A. For the parcels A, B, and C and present existing improvements in warehouse usage, \$2,950,000.

Q. Let us round it to millions. A. All right.

Q. And 30,000 square feet of land. Now, divide (440) 30,000 square feet into three million; what do you get? A. 100.

Q. \$100 a square foot? A. Yes.

Q. If you divide 35,000 square feet into 3 million, what do you get? A. Something less. Shall we say 95 or do you want to know exactly?

Q. Is there one piece of property in this area that you talked about that sold for \$95 a square foot? A. Yes.

Q. Are you talking about the Raleigh Hotel sale? A. Yes. Also about the Smith site at 12th and E. On a much smaller site with practically no alley by comparison.

Q. That sold for \$75,000? A. Yes.

Q. That sold for that one month before the subject property. A. Yes.

Q. That does not give you \$95, a square foot, does it? A. Does it give me \$95 a square foot for this property on a ground foot basis only? Of course not. But (441) the improvements had value, and I did not see and do not now see that the improvements were something that should be hauled down and knocked out.

Q. When I took your reproduction cost plus land value, I took everything you ever talked about at \$3 million, did I not? A. As a warehouse.

Q. What was there? A. As a warehouse. It was not its highest and best use.

Q. I am not asking you that. I am saying, you took the improvements and everything else on the property, including land, and came up with about \$3 million. A. Right.

Q. That gives you about \$95 a square foot overall, right? A. Overall being or disregarding the improvements as having any value and attaching the entire estimate to the ground. I have not done that. I gave value to the improvements.

Q. I understand that, completely.

(Mr. Liotta) If Your Honor please, my next questions are going to be directed to capitalization. I would like to reserve my objection to type of evidence.

(The Court) We are going to take a few minutes at this time, gentlemen. Would you come up here?

(442) (At the Bench.)

(The Court) The Court was of the opinion when Mr. Kolb started off his testimony that he had talked about different buildings that he knew of that had been used as warehouses.

(Mr. Liotta) Yes, sir, I am going to get to that.

(The Court) That had not been converted.

(Mr. Liotta) Yes.

(The Court) I wanted him to go over that.

There were no details asked.

(Mr. Liotta) I know.

(The Court) I wanted to get to that.

(Short recess.)

(443) (The Court) You may proceed.

By Mr. Liotta:

Q. Mr. Kolb, you had adopted a rental value for the warehouse. Would you tell me how much that was, sir.
A. Yes, sir.

Q. That was \$1.00 a square foot? A. Yes, sir.

I used the figure \$1.00 a square foot. But I said I had not computed it.

Q. You had not what? A. I had not worked a financial statement on this building. I had not worked the income approach on this building as a warehouse.

Q. You have not computed it? A. That is correct.

Q. Where did you get the \$1.00 a square foot? A. I think in answer to Mr. Yochelson's question as to what rental could be gotten for warehouse space of this sort in downtown Washington, I said \$1.00 a foot. I think at that time I said I had not run an income approach.

Q. Why did you not say \$2 a square foot? A. Because the facts bear me out at \$1.00, the market does.

Q. What facts? That is what I am asking—where are your facts? (444) A. As to rental comparables.

Q. Yes, sir. Somewhere near the property if you have it. A. I will get as near as I can, but that is rather difficult for warehousing is generally not found in the C-4 area, the downtown area. The land is too expensive for that purpose. Therefore, we must for the most part go to the perimeter of the city to find warehouse space.

Q. Go where you want to go. A. I have before me 9 rental comparables of warehouse properties that I made in connection with the warehouse appraisal, principally in the New York Avenue and Bladensburg areas.

Q. Let us start with No. 1. Where is it? A. 3113 V Street Northeast.

Q. The address? A. 3130, 3130 V, as in Victory.

Q. How old is the building? A. Built in 1958.

Q. How many stories? A. One and a half.

Q. How many stories in the front building on this property? (445) A. Eight.

Q. What were the terms of the lease and the parties? A. A twenty year lease for 30,000 feet at \$1.35 a foot.

Q. \$1.35 a foot on V Street? A. Yes, 3130 V Street—a 1958 building.

Q. How was the street access and landing platforms? A. Good loading platforms, V is a wide street, even though it is a dead end. 3135 V is a building built in 1955, 73,423 square feet of land area, 50,620 feet of building area. Leased for \$1.20 a foot.

Q. How many stories? A. One and a half.

Q. 1955, a new building practically? A. Yes, these are new buildings.

Q. Who were the tenants? A. I do not have that.

Q. Didn't you examine the lease? A. Yes.

Q. Who were the owners? A. I do not have that, either.

Q. What kind of business was conducted there? A. Other than a warehouse wholesale type, non-retail (446) business, I do not recall on that.

Q. Go to the next one. A. 3148 and 3150 Bladensburg Road, Northeast, built in 1960, leased for a period of five years, a one-story building on 30,000 feet of land, leased at \$1.13 a foot.

Q. Did you examine the lease? A. No.

Q. Do you know whether there were any unusual terms in the lease? A. I definitely have done that.

Q. One story. A. Yes.

Q. How many square feet? A. 30,000.

Q. How was it as to loading? A. Excellent. That is true in all of these. They are modern warehouse buildings.

Q. Real modern warehouse building? A. Yes.

Q. Your next one. A. 2149 Queens Chapel Road, built in 1946. The lease commenced in 1955 and was for twenty

years. 13,600 feet of building on 19,000 feet of land, leased at 90 cents a foot.

(447) Q. What year? A. What year was it leased? 1955. Built in 1946.

Q. 90 cents a square foot? A. Yes.

Q. How was the property—better as far—withdraw that.

Is that a new building? A. These are all new buildings; good, modern docks.

Q. Modern, class-A? A. Yes. A small air conditioned office. Most of them warehousing, though.

Q. How about the next one? A. 1441 Oakie Street, Northeast, built in 1941, leased in 1956 for five years. It is 8700 feet of land with a 10,000 foot building. It is about one and a half stories, rented at 95 cents a foot. Per year.

Q. How was that? A. It is also the same—modern warehouse.

Q. Any more? A. Yes. 2825 V Street, Northeast. Built in 1952, leased in 1959 for a period of ten years. It is on 20,000 feet of land. The building is 15,000 feet of area, a one story building, leased for \$1.10 a square foot.

Q. Now, the next one? A. No. 3370 V N.E. built in 1955. I do not have documented the year of leasing. It would have been close into the time I made this report, which was (448) November of 1962.

That lease, 20,000 feet of land with 20,000 feet of building at \$1.00 square foot.

Q. How was that one? A. Same, modern—new.

Q. It was not eight stories high, though? A. No.

3163 V Street, N.E. built in 1951 and leased in 1951 for fifteen years, situated on 17,500 feet of land with a building of the same size, one-story, leased at \$1.10 per square foot per year.

Q. Next? A. No. 3851 V Street, N.E. built in 1951 and leased summer of that year.

I do not have the term of the lease. On 13,900 feet with 13,900 feet of building, one story, modern, at \$1.30 a foot.

Q. All right. A. Those are my nine.

Q. In your search did you happen to get to Kalorama Road—did you happen to find a warehouse there? A. I know the warehouse that you speak of. I did not put that in my report because my report pertains to a piece of property that is outside of the city.

Q. It is a three story building, though, is it not? (449)
A. The Kalorama Road? I am thinking of a bowling alley.

Q. 1701 Kalorama Road. It is a three story building.
A. I have a recollection of it.

It is two, three or four. I would not know.

Q. In other words, you would not be skeptical of someone who used 2149 Queens Chapel Road as a part of his research as to warehouse sales, would you, because you used it, did you not? Isn't that one you used, 2149 Queens Chapel Road—or was it 2146? A. 2149. Not as a warehouse sale but warehouse rental.

Q. I mean rentals.

You would not be skeptical of anyone that used 3155 D Street, would you, because you used the lot yourself, did you not? A. I used it myself in a report pertaining to a warehouse in that area.

Q. Now, let me ask you this, Mr. Kolb. If you had rented a multi-story warehouse within a block of some of the subject property, would you give that consideration as a comparable rental for warehouse? A. I would.

Q. Wouldn't it be a fact that a four-story building would be greater in degree of comparability than a one- (450) story building? A. It would.

That is one of the bases of comparability.

Q. Let me ask you this. Did you first search around this neighborhood to find out if there were any warehouses and warehouse rentals? A. I did not because the warehouse is not the highest and best use, that is the reason.

Q. I did not ask that. Did you search for warehouse rentals is what I asked? A. No.

Q. Yet you stated in your opinion the warehouse would rent for \$1.00 a square foot. A. That is my opinion.

Q. Would you change your opinion if you knew that 927 D Street, next door to this property, rented in the fall of 1962 for 46 cents a square foot, a four story building, would you change your opinion at all? A. Would I what—what year?

Q. 1962. A. No, I would not change my opinion.

Q. Is this or is this not a fact that people that handle warehouse storage type of properties find the property more economical, both in so far as their labor and in so (451) far as their charge per customer than on a one story proposition? A. Yes, as one of the elements to be considered.

Q. Would you say that a one-story warehouse would rent for 50 per cent more than an eight story warehouse, generally? A. It cannot be answered until other factors are brought into the picture.

Q. I might ask you what other factors you are talking about? A. Location is the principal one:

Q. The V Street property that you talked about, in so far as warehousing is concerned, wouldn't you say that would be a better spot than this property? A. No, no, I did not say it was a better spot than this property from a value standpoint.

I said from warehouse standpoint.

Q. I said for warehouse business purposes. A. For warehouse, period.

Q. It is or is not? A. The V Street is a better location.

Q. You get more rent, would you not? A. No, that does not follow.

Q. Now, as I understand it, in your reproduction method, you took a ten per cent depreciation value, is that right? (452) A. Ten per cent depreciation; yes.

Q. Now, let us turn to your capitalization. Did you attempt to capitalize any proposed income or any estimated income of the improvements as they existed? A. As a warehouse?

Q. Yes. A. No, as I said, I did not make an income statement on the warehouse.

Q. Well, let me ask you this: Do you feel that a reasonable and prudent person would have reproduced this property new at the time of taking? A. As a warehouse.

Q. I am talking about the building. A. As a warehouse?

Q. That is what it was. A. Which was a warehouse, no. They would not.

Q. Now, in reference to your—I am not going to be specific—you do not have to check your notes.

But in reference to your sales, you took the Government—the Federal Government—

(The Court) Wait a moment.

Come up here.

(Discussion at the bench off the record.)

(453) By Mr. Liotta:

Q. Now, Mr. Kolb, in your consideration of this property, you took into consideration as part of the market of the United States— A. As part of the market?

Q. Yes, sir. A. The lease agreement upon the subject property was taken into consideration in one of my methods of coming to an estimate of value, yes.

Q. That involved the United States Government, did it not? A. Yes.

Q. Generally speaking, do you consider the United States Government as part of the market as far as your market data was concerned? A. Definitely.

Q. Is it possible at any given time that a specific need for a particular piece of property may require the United States to take a piece of property that the general market would not take for purposes that the general market would not take? A. Take it by condemnation, is this the word?

Q. I am talking about by lease or sale? A. Yes.

Q. It is possible? A. Yes, sir.

(454) Q. You have seen it happen in this city wherein the United States on many occasions—many occasions, am I right—has rented property that the general market would not rent? A. I have not.

Q. You have not? A. No.

Q. Is it your statement, sir, that any other party other than the United States, would rent this particular property? A. Yes.

Q. The general market? A. Yes, in bulk or in individual tenancy.

Q. Did you make any investigation to find out whether or not there was any specific urgent need by the United States for this property? A. I did not.

Q. If you were advised that there was a specific urgent need for this property, would that in any way affect your consideration of the capitalization approach to value? A. It would not.

Q. Is it or is it not a fact that in sales involving the United States or leases involving the United States, that there is ever present the possibility that property (455) would be condemned? A. Yes.

Q. Is it your opinion or is it not that property that may or may not be—and I am not indicating this was or was not but talking generally—the property that may or may not be under the threat of condemnation would vary the

terms of an agreement or sale—is it possible? A. A sale, lease, agreement?

Q. Sale, lease. A. Yes. It often has a depressing effect on the market.

Q. More than not has a depressing effect, that is your statement? A. That is my statement.

Q. Now, you took a ten per cent depreciation factor on the building as it existed. After you got done building this office building you are talking about, what was your depreciation factor there? A. Two per cent per year because I had an economic future life that the building could produce income for fifty years for two per cent per year.

(The Court) Mr. Kolb, the Court understands you to say that when you appraised the property in question, you took a ten per cent depreciation?

(456) (The Witness) Yes, Your Honor.

(The Court) So that leaves the 90 per cent.

(The Witness) No, Your Honor.

(The Court) What?

(The Witness) No.

(The Court) What does it leave?

(The Witness) The ten per cent depreciation is only the worn-out portion of the building that has accrued from the time—from any time up to this time, and \$77,000 or thereabouts would be required to correct the deficiencies of the plumbing and electrical system of its elevators and roof.

(The Court) Let us start the other way, Mr. Kolb.

The reproduction cost you testified was how much?

(The Witness) As a warehouse?

(The Court) Yes.

(The Witness) After depreciation—

(The Court) No, before depreciation.

(The Witness) \$74,000, Your Honor.

(The Court) Now, you depreciated that what?

(The Witness) Ten per cent.

(The Court) So there was 90 per cent left?

(The Witness) I see your point, Your Honor.

(457) (The Court) That was for warehouse purposes.

(The Witness) Only.

(The Court) Only.

Now, did you depreciate it for office building?

(The Witness) Yes, sir.

(The Court) What was your depreciation for office building?

(The Witness) I need to go to the figures.

The depreciation I used, and I want to refer to this because I spoke from memory earlier—was 2 per cent per year, assuming the converted office building would be able to produce income in its renewed condition for fifty years.

(The Court) You took—

(The Witness) Two per cent of the gross income, that would have to be laid aside.

(The Court) No, you do not follow me.

You went over and you appraised the building?

(The Witness) Yes.

(The Court) Now, you depreciated it for warehouse purposes.

(The Witness) Physical depreciation, your Honor.

(The Court) Now, what, if any, depreciation did you put on that building for office building use?

(458) (The Witness) None on the shell.

(The Court) Well, that is the point.

(The Witness) But only on the building as it would be converted to an office building as an entirety, but only afterwards.

(The Court) I see. So that you did not depreciate the building for office building purposes.

(The Witness) No.

Not in its present condition.

(The Court) All right.

(Mr. Liotta) May I have the record indicate that my questions at this point—I want to reserve my objection on this type of evidence.

(The Court) Yes. The record will so reflect.

By Mr. Liotta:

Q. This government lease that you had used to arrive at your capitalized value is for how many years if and when the building was built? A. Five years.

Q. And your economic life, in other words, your estimate was, was it not, that this property would produce this income for a period of fifty years, was it not? A. Yes, sir.

(459) Q. And you utilized what we know and what you know as an appraiser as what kind of a method of capitalization? A. Income approach, capitalization method.

Q. The appraisal term for the rate you use would be 'straight line,' would it not? A. Yes.

Q. Now, you say you went to the market and you made a determination that the market would only require the return of their capital in 50 years, right? A. Yes, sir.

Q. So, if they invested your \$4,257,000, it is your testimony that they are going to wait fifty years before they recapture all of that money? A. No, that is not my testimony.

Q. Your testimony is, is it not, sir, that you took a two per cent factor for what is known as depreciation? A. Yes.

Q. In your capitalization method. That means that two per cent per year will be returned and applied toward the recapture of the improvements? A. That is correct.

Q. Do we understand each other now, sir? A. Yes, up to this point and I think—

(460) (The Court) Did you want to say something?

(The Witness) The only difference is that the vacant lot is included in that figure, and it is not a figure just for this building is my best recollection.

By Mr. Liotta:

Q. All right, I will apply it toward your building. I had used your final valuation, is that what you are talking about? A. Yes, including all three parcels of land and not the two parcels and the building.

Q. The two parcels and building, using your capitalized method of appraisal, that is under lease? A. \$3,450,000, which includes parcel A and Parcel B of land only, and the remodeled structure on top of those two sites.

Q. So, in effect, you are saying, are you not, that this land owner will receive as rent on this for a period of fifty years, \$388,992.92, are you not? A. Yes.

Q. Now, taking your figures of that rent, for that five-year lease, and instead of using a capitalization of 9 per cent, what would happen if you estimated that the remaining economic life of this property was, say, 25 years? (461) what would that do to your capitalization rate? A. It would have 4 per cent to be added to the return of capital.

Q. Take four per cent and your seven per cent return. A. Eleven.

Q. And tell me what happens to the value of your building then. A. Eleven per cent return means we will run down the value of our property.

Q. Would you run it down for me a little bit?

(Mr. Yochelson) Objection. The witness has answered. This is an assumption.

(Mr. Liotta) I submit this goes to the credibility of the witness and that is the point I am getting at.

(The Court) You may proceed. The witness may answer.

(The Witness) Using 11 cent, that figure, we would come to approximately \$340,000 more than \$3 million four hundred thousand.

By Mr. Liotta:

Q. May I have that again? A. Using an 11 per cent figure, 11 per cent, 4 per cent for 25 years economic life, 7 per cent for return (462) on investment, giving a total of 11 per cent.

Q. And 11 per cent rate attached to the income. A. Eleven per cent overall.

Q. And attached to your imputed income to both of the buildings—you imputed \$226,000 to the building? A. No, not imputable.

Q. Let me understand you. What portion of the income did you impute? A. \$223,000 for the building.

Q. Capitalize that at 11 per cent. A. All right. Now, I come to a figure instead of two hundred, two million two hundred and sixty, I come to a figure of two million two hundred and thirty-three for, imputable to building.

Q. Are you telling me that if you take 11 per cent of 203,000—was it reciprocal of 11 per cent? What is it? A. I do not know.

Q. When you got your 9 per cent of 203,000, how did you work that?

(The Court) Mr. Liotta, not this late in the afternoon.

(Mr. Liotta) All right, sir.

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(468) CROSS EXAMINATION

By Mr. Liotta:

Q. Mr. Kolb, in your consideration of capitalization, you are, in effect, considering in your mind what an investor would pay for a particular piece of property; is not that correct? (469) A. That is correct.

Q. Therefore, you would be in a position of advising an investor that, in this particular instance, he should pay \$2,500,000, some odd for a piece of property based on your consideration of the government lease as an indication of value; is that correct? A. Yes.

Q. You definitely advised that as an indication of fair market value? A. That is correct.

Q. Therefore, this investor would necessarily be in a position of wanting every bit of your expert advice on every phase of this government lease? A. That is correct.

Q. In the event there were some variables, you would have wanted to make a complete investigation to be sure that your advice was 100 per cent correct? A. I would want to have the lease, examine it in detail, and pass it on to my client.

Q. You would want to know not only the capitalization of the lease, but you would want to know the ability of the owners to carry through and make it into an office building? A. The owners, yes. The capitalization rate I would apply.

(470) Q. Based on your consideration, as I understand your examination of your similar considerations in the market? A. That is right, and the cost of money, what rate is required to attract money.

Q. Now, let me ask you this: Did you utilize, although I am not arguing with your seven per cent rate—did you utilize a built-up rate, or did you say you went to the market? You cannot do both? A. There is a money market and a real estate market. Oh, yes. The money market starts with the prime rate to the government bond taxable, the

government bond non-taxable. My rate has to be built because of its lack of liquidity that real estate has. It does not change hands like a stock or bond, with that quickness. There is a risk element involved in real estate that is not in bonds.

There is a management element that does not exist in government bonds. All of these factors go into the judgment of what the money market is, No. 1, then what the real estate market is. Then what other investors are doing. That tells me the story of what another investor will do.

Q. Let's say I am the investor from Virginia, coming into your office, and you go through what you have gone through (471) and I say to you, or you said to me that they paid a million dollars ten months before, and I say, 'Well, Mr. Kolb, who are the owners of this property as of the time I am ready to buy at your figure;' can you tell me who the owners of this property are? A. The owners of this property prior to the date of taking?

Q. Prior to the date of taking and at the time the government lease was entered into. Who were the owners? A. Dicker and Lawrence.

Q. Who else? A. The third gentleman's name—I have met but I cannot recall—Fromkin.

(The Court) Fromkin.

By Mr. Liotta:

Q. Was it David Fromkin? A. That is the name.

Q. Mr. David Lawrence and Albert Dicker? A. That is right.

Q. Bearing in mind—I want you to understand I am not contesting the validity of the lease agreement of the United States, but I want to ask a question. I am the investor from Virginia now. As far as you know then, (472) these gentlemen were the owners of this property at the time of the lease, too, weren't they? A. That is my understanding.

Q. Do you have the lease in front of you, sir? A. I can get it in front of me. Now, I have it in front of me.

Q. Now, I am going to ask you, Mr. Kolb, as my adviser, have you checked all the factors involved and are you sure of everything concerning that lease? I presume your answer would be that you are; is that right? A. As well as I am able to read it.

Q. All right. Tell me, who signed that lease?

* * * * *

(475) By Mr. Liotta:

Q. Will you answer the question? A. Your question, I think, of me was who signed the government lease.

Q. Yes. A. For the United States, by H. A. Abersfeller, Regional Administrator, General Services Administration, Region 3. It is also signed by Albert P. Dicker and David Lawrence.

Q. Is that it? A. I beg your pardon.

Q. Nothing else? A. That is the total signatures, other than the witness' signatures.

Q. Now, again as I say, I am not testing the validity of the lease—that is a valid lease so far as I am concerned.

Now, I am the investor and I am going to say, 'Mr. Kolb, you told me three people owned it and two people signed. What is the authority there on behalf of the others that were not there.' A. At the time this lease was signed, it was my understanding that two people owned this property. Within the last day or two, I have been told three people had (476) interest in it.

If my client is seeking my advice, I would say this is a title matter, and an investigation of the title would disclose the facts.

Q. Then, in other words, your understanding is that two people were owners at the time this lease was entered into? A. That is correct.

Q. You are not contesting the fact that they had ample authority. You, as an appraiser, would not go further than

as to say it is a title matter to me when I am going to spend two and a half million dollars? A. You would not spend that. For a matter of fifty or seventy-five dollars, we could get the title searched within a matter of days. The matter would not be investigated—if we had reason to—

Q. Are you qualifying your appraisal? A. Am I qualifying what?

Q. Are you qualifying your appraisal? A. I am changing the amount that I testified to, is that what you are asking me?

Q. Qualifying your appraisal—advising me as an investor, depending on what the title search would show? A. No, I am not qualifying my advice to the client. (477) If you are saying, 'Am I qualifying my appraisal.'

Q. We are talking about— A. I thought you were talking about am I qualifying my appraisal in court, the usual title search—market—

Q. I am agreeing they had authority to sign for the other side. I am going to the fact that you are advising an investor to pay two and a half million dollars for this property. A. And as to whether or not the title situation should be preventing—whether it should prevent his paying that? Is that correct? I want to understand you and I am not sure that I do.

Q. I will go over this once more. The only point I am going to is, when you give me this advice to pay two and a half million dollars for this property, and I ask you the question: Would you then turn to me and say that is a matter of title? If this lease is not right, it is one thing. If it is now, it is another. A. Would I turn to you and ask what? Let's ask for the question.

Q. Let us go to another question. A. I would advise my client if you are asking me to give advice, to spend fifty or seventy five dollars (478) before even opening up his pen.

Q. Would you as an adviser to me as an investor, before you advised me as to the capabilities of a lease or income,

do you not think you ought to know the title is good? A. I do not make a title examination, but I would advise my client to have that title examination made, and his contract for whatever it is is to be contingent on a good and marketable title. He is not going to get too hurt.

Q. Now, in your capitalization process, there are a number of matters which are left to your opinion, are there not? A. Oh, yes.

Q. Let us start with what is left to your opinion. Let us take, then, for granted the government was going to lease this property at your \$388,000 or \$398,000—or whatever it is.

What is your first— A. Vacancy and credit loss.

Q. Have you had any experience to tell you as to this particular property as to what the credit and vacancy loss would be? A. No, if I did, I would not use it.

(479) Q. No. 2, as to the vacancy and credit loss, how long is this government lease? A. Five years, firm.

Q. You estimated the economic life at fifty years. A. After remodeling.

Q. Fifty years after remodeling at income of \$388,000 or whatever it was per annum—fifty years— A. No, no, no. For five years firm. We are appraising the property as of a given date and not fifty years hence.

Q. Wait a minute. Let me ask you this: Is your capitalized value for five years or fifty years? A. My capitalized estimate is as of January 18, 1962, period, that day.

Q. 1963? A. Sorry, 1963.

Q. You estimated the rental for that to be the amount of the government lease for a period of fifty years, did you not? A. As a minimum; yes, sir.

Q. Now, it was going to produce at least \$388,000 or \$398,000—whatever it may be. A. Yes, sir.

Q. For fifty years. A. Yes, sir.

Q. So that is the first place your opinion (480) comes in?
A. That is correct.

Q. Now, this is the building you said would last over a hundred years. A. No, I did not say that, Mr. Liotta. I said to you that the skeleton—the concrete and steel—in my opinion, will be standing—if it is elected to let it stand, for another hundred years. I said to you that fifty years that the improvements that are put in there will wear out in that time.

Q. All right, sir.

Now, let us go to your next item in your capitalization approach. Your question of expense. Let me ask you—that is a matter of your opinion, too? A. No.

Q. It is not? A. No.

Q. Were there any experience expenses in this building?
A. As an office building—no, but it is the same expense as comparable office buildings would have.

Q. Was there any experience in this office building? A. No.

Q. You went to comparable office buildings and had to use your judgment and opinion to come back to this one? (481) A. I used the facts I gathered and applied them in this instance.

Q. With your opinion and judgment? A. Mr. Liotta, it is not my opinion that the General Services Administration say their government operation in bulk rentals is at the rate of thirty-three—

(Mr. Liotta) Your Honor, this is not responsive. He is getting into other government leases.

(The Witness) I was getting into market data of where I gather this information.

(The Court) I am sure the jury is concerned with the remaining forty-five years, Mr. Kolb.

(The Witness) Yes, sir.

(The Court) What did you do on that?

(The Witness) As to gauging the rental?

(The Court) No, no, as to gauging the expense and maintenance, and such.

(The Witness) As of January 18, 1963, I estimated the expenses as of that day. I know that over the period of fifty years that the expenses will likely be increasing and the taxes will be increasing and so will the rental be increasing. The best evidence of that is that this very lease says it will increase.

(The Court) All right. Now, at the termination of the lease, for the forty-five years, what (482) would be the situation so far as you are concerned?

(The Witness) I leave at the end of that time, the bulk tenant that would take the entire property, would pay this much rent—the present rent, the January 18, 1963 rent—or individual tenants would pay that, and the market place tells me this happens. That office buildings of this sort do not sit vacant.

(The Court) Would there be any more expense to the owner with individual tenants?

(The Witness) Yes, Your Honor.

(The Court) That is what the jury would like to know.

(The Witness) There would be. For the reason that under the lease, the tenant, under the bulk government lease, would pay electricity, water, heating and cooling. If there were individual tenants in individual rooms, the owner would pay those charges, but he would pay a higher—charge—rent to the tenant to supply these services but he would find that one would offset the other.

By Mr. Liotta:

Q. Mr. Kolb, you estimated—using the government lease—that the rental at the date of taking would be \$388,992.92 as it is, is that right? A. I did not estimate that. I took those figures from the lease as fact.

(483) Q. I stand corrected.

You utilized that figure of gross rent for the purposes of your capitalization; did you not? A. Yes, sir.

Q. You did not utilize the option period of the U.S. with a may or may not take the property? A. I did not take that into consideration.

Q. You did not utilize any fair rent that may apply fifteen years from now? A. No, I did not. I appraised it as of January 18, 1963.

Q. And the rental could go down as well as up in the future? A. That is correct.

Q. You took, as a figure, the rent the Government was supposed to pay under this lease? A. That is right, for a period of five years.

Q. So that figure that happens in the future had no effect on your capitalized value whatsoever? A. In seeking an estimate of value as of a specific date and not a future date.

Q. There is no need for you to talk about something that may happen in the future so far as the rent is concerned? (484) A. Not in the future; that is correct.

Q. Now, as to expenses, as you go along, you take expenses here on a constant basis as of January 18, 1963? A. I have taken it as of January, 1963; that is correct.

Q. However, your capitalization rate should reflect, should it not, the possibility of the increase as you had stated would happen, the increase in the expenses, am I right? A. No, the capitalization rate will remain constant.

Q. That is not part of the risk here. A. The capitalization rate is only that which is required to be set aside each year from the rental to put the property in a position, fifty years hence, to take this building down and rebuild it when the building wears out, when it ceases to be modern and ceases to be up to date. It takes two per cent per year of his total income and lays it aside. He will have 100 per cent in fifty years and will have enough money to put this building up again.

Q. Let me ask you this: If I asked you what are the chances of the expenses going up here, during this fifty year period you are talking about, aren't you going to say to me that you took that into consideration when you (485) arrived at your rate. A. I am going to say it is going to be probable. I am going to say the income goes up, also. Water reaches a level. So does value. One does not go up without the other going up.

Q. Are you saying the rent goes up all the time in every case, where the expenses go up? A. I am saying that, exactly.

Q. Now, your expenses then are based on your judgment or as you say, your experience in other buildings? A. That is correct.

Q. As applied to this building? A. Yes.

Q. You are utilizing this expense figure for a period of fifty years? A. I am utilizing it to arrive at a conclusion of an estimate of value as of January, 1963.

Q. Based on an economic life of fifty years? A. Yes.

Q. Now, the next assumption you had to make, or part of your opinion would be the question of the amount of taxes payable? A. Yes.

(486) Q. As part of your expense? A. Yes.

Q. That was a figure of thirty-five thousand dollars based on your opinion, is that correct? A. Yes, sir.

Q. A variable or a mistake by you in any one of these expense items—up or down—could make a substantial difference to me as an investor, could it not? A. No. Because this would only be one method that I would use to come to an estimate of value that I would relay to my client. This is one of the touch stones, benchmarks, that is all.

Q. But you did utilize it as an indicia of value? A. I have utilized this only as an indicator of value to bring me to my own judgment of what the value of this property was as of a given date.

Q. Aside from the sale on 12th and E and The Raleigh Hotel, and aside from this capitalization approach, is there anything that you have testified to as to sales in the market which support your \$2,555,000, or whatever it is? A. I gave them to you, yesterday, yes.

Q. Now, the next question in your capitalization approach which is a question of judgment on your part is the (487) question of your six per cent rate as to land, which I will accept, but the next question is the matter of judgment as to what capitalization rate and what rate of recapture the investor would want. A. That is a question of judgment based upon the market. That is correct.

Q. Now, I asked you yesterday and I am asking you now if you varied your rate—let us start with, instead of 9 per cent—let us start with 11 per cent as against your \$203,000 of net income imputable to the building that you found, instead of capitalizing at 9 per cent, let us estimate this building, 50 years as an office building, would last, instead 33 years, and would make it about 11 per cent A. All right.

Q. On the basis of 33 years, applying on that amount, your capitalization rate, what would happen to your building value? A. Mr. Liotta, I have this fear—and I think it is fair to answer in this manner, and Your Honor can say so if not.

If I start using your words and figures, I have got to identify those as your figures. All I will be doing is a mathematical process for you, of your figures. I (488) have nothing to do with these figures, I do not want the jury to think they are mine just because I am using them.

Q. I would be very happy for the jury to know they are mine. A. You wanted that calculated on 33. You want me to make an income calculation on the basis of 33 years economic life?

Q. Yes. A. At 11 per cent return, is that what you want?

Q. Yes, use 11 years as your capitalization. A. This is going to take some minutes now.

Q. It is a reciprocal of 9. Eleven into 100 is nine-something, is it not? A. If you say so, Mr. Liotta.

Q. Go ahead and capitalize it. A. This is going to take some time, because I am going to do it right.

Q. You have to divide, don't you? What process do you use? A. I would like to answer your last question before getting into another, if I may.

Q. All right.

Do you need some paper? A. No, I have paper, thank you.

(489) I am still going to be using a 7 per cent return with the investment, and I am using a 33 year economic life for that to let us arrive at a 3 per cent return of capital.

Q. Yes. A. Or an overall rate of ten per cent. Do you understand that?

Q. First start off with an overall rate of 11. How many years is that? A. Do you want to change the rate to eleven?

Q. I was talking about 11 in the first instance. Are you at ten? A. You were talking about three and seven. Now, do you want 11?

Q. Use 11 right now. We will go back to ten. A. I want to be sure I understand the question. You want $33\frac{1}{3}$ economic life— $33\frac{1}{3}$ years economic life.

Q. Right. A. At 7 per cent, that's what you want me to do is it?

Q. Seven per cent plus your 33-year life. What is your total rate? A. Ten.

Q. Use them then. A. All right. At a ten per cent rate upon the income of \$203,478 would reflect a value to the improve- (490) ments of \$2,034,780.

Q. All right. So a variation of one per cent, in your opinion, dropped it down from \$2,260,000, to \$2,034,000, is that right? A. That would be your estimate, yes, sir.

Q. Using my estimate it is understood with a variation of one per cent from your figures? A. Your figures.

Q. One per cent from your 9 per cent would drop it down to \$234,000. A. Using your figures which I do not—

Q. I understand that. A. I want the jury to understand it.

Q. I am sure they do. I want them to, too. I am asking you, doesn't that drop it down—let me put it this way: Your figure of value for the building at 9 per cent capitalization total was \$2,260,000. A. Yes, sir.

Q. Using my figure of 10 per cent, your \$2,034,000? A. Yes, sir.

Q. Or a drop of approximately \$226,000, is that right? A. You have dropped \$226,000.

Q. Use my figures just one more time and instead (491) ten per cent, let us use 11 per cent. How many years is that? A. How many years is 11 per cent?

Q. Seven per cent plus four. A. Now, I understand you. We are talking about eleven. What value would be reflected using your figure of 11 per cent.

Q. Yes, sir. A. \$1,847,800.

Q. \$1,847,000 and how much? A. \$800.

Q. This would be my figure as against your figure? A. That is correct.

Q. Or a difference of almost \$500,000 by two per cent difference. A. That is correct.

Q. So that your judgment in selecting this capitalization rate is very important, is it not? A. Definitely.

Q. Now, the next question of opinion is your indication, from the search of the market, of your land value, that is your opinion, too, is it not? A. That is my opinion resulting from an investigation of sufficient sales in time near to a specific date in location and adjustment of all factors as to (492) terrain, soil, width, area, amenities; yes.

Q. With the exception of the sale of the subject property ten months before the taking for \$1 million? A. We spoke of this, yes, sir. I can use that sale. I said that I did not.

Q. Now, you are going to change your testimony and say you could? A. No, no. I am not changing. I said I could do it. If I could change it this lease that intervened will pay a much higher rate per square foot than was paid by the purchasers.

Q. So you are hanging your hat on the government lease? A. No, I am not. I am hanging it on the market.

Q. Now, using your figures for the land under the buildings—and I presume the lot 50, the parking lot in the rear—and excluding the two front lots that went under the buildings, you came up with a land value of how much, using that part of your capitalization approach? A. Let me be sure I understand your question. What is my estimate of the value of all of the land except that which is under the front of the building?

Q. Right. A. \$1,270,120.

Q. Plus the capitalized value of your buildings is (493) how much? A. Of all of the buildings?

Q. The buildings. There are two of them, are there not? A. That is right. We just excluded one, I think.

Q. Let us take both of them. A. All right.

Q. The fact is it was \$2,260,000 using your capitalized value? A. I am going farther, Mr. Liotta, to answer your question. You asked the building value which is \$1,673,000.

Q. No, I do not mean that. You misunderstand me. A. You asked me about the building.

Q. No. I am asking before you deduct the cost to make this into an office building, I am asking—utilizing your nine per cent capitalization factor, what was your building value on the income approach? How much did you value the income on the building on the income approach? Was it not \$2,260,000? A. Under the income approach the net rent

imputable to building was an income of \$203,000 which reflected at the rate of 9 percent to \$226,000.

Q. Yes, add \$2,260,000 to \$2,173,000—\$2,173,200, and you get a total under the capitalizing of \$3,003,000— (494) some odd. A. Are you adding the land under A and B?

Q. Yes. A. \$3,450,000.

Q. \$3,450,000? A. Yes.

Q. Now, you added the value of the parking lots in front at how much per square foot? A. \$60 a square foot.

Q. That came to— A. \$870,000.

Q. That give you a value? A. \$4,250,000 in toto, after the building had been remodeled, under the lease. That is one of the estimates.

Q. Now, your cost of remodeling was then deducted, is that right—before we get to that—your \$4,257,000, meaning when it was converted into an office building, excluding the cost to make it into an office building, how much would \$4,257,000 be per square foot?

(Mr. Yochelson) I submit this question involves factors which are not part of the building. This four million plus figure includes the additional land which is not part of it.

(Mr. Liotta) I am asking for the total number of 35 square feet divided into the two million—

(The Witness) It would come a little over a hundred dollars a square foot which many office building sites sell for in Washington.

By Mr. Liotta:

Q. Now, you deducted how much from that figure for the cost to make the improvements, one million six hundred some-odd? A. What did I deduct from the \$2,457,000 to come to my estimate of value? I did not. I reached the estimate of value as my opinion. But if you want me to deduct, we will come around to \$2,577,000.

Q. Wait a minute. Maybe we could—perhaps we do not understand each other. You had \$4,257,000 total of an improved office building, throwing in the land.

Now, you say \$1,600,000-some odd. A. Yes, sir.

Q. Did you deduct the \$1,600,000 from the \$4,257,000?
A. \$1,675,000 was the amount of deduction.

Q. \$1,675,000. A. Yes.

Q. You deducted that from \$4,257,000? A. \$2,577.00, going from memory, does it not?

Q. I will accept that. That is the answer. Now, let me ask you, you had in your original premises here, (496) assumed, I presume, as I gathered your testimony, that the Merchants Storage and Transfer people were uninformed when they sold this property in March of 1962. A. I do not know how well they were informed. I did not say informed or uninformed. I said they made a mistake so I must presume they were uninformed.

Q. I presume on the other side you were also of the opinion that Mr. Dicker, Lawrence and Fromkin were informed. A. History since the sale proves it.

Q. I could also presume that it would be your opinion that they were fully aware of whatever they thought was the possibility of the lease of this property when they bought it for \$1 million? A. The history since the purchase proves it.

Q. So that the capitalization process that you have is not necessarily related to what an investor would pay for a piece of property when the building is not there, is it?
A. I want you to give the question again.

(Question read.)

A. When the building is not there?

Q. That is right. A. Very much. Using a capitalization approach on a (497) projection of an office building, it is a necessary thing to do to inform oneself as to whether or not it is feasible to take the parking lot for instance, as to

whether or not it is feasible to put a parking lot on that, what rent and income you could derive. You must go through the steps of the integral approach on a piece of vacant land. Not necessarily commercial. A builder, building a house, a speculator, has to reason out what he might be able to sell it for; whether or not you are selling rental space or fee space does not matter. You have got to see the future. The purchasers of this property displayed that ability.

Q. Did you take into consideration another possible variable to your capitalization approach: Did you take into consideration that there might be a possibility that the rent may not equal \$388,092 when this building was done? A. I did not have to debate that because there was a lease on it.

Q. You have testified that you know about these government leases. Do you know about the Economy Act? A. I do not think that I have testified that I know about these government leases in such volume as might be indicated. (498) You asked about the Economy Act. In such name I am not sure. If you are speaking of the 15 cent bit, I am familiar with that, but I am not in government.

Q. Do you know anything about the 15 per cent, can you tell me what it is? A. Vaguely.

Q. Can you tell me what it is? A. You speak of it as an Economy Act. If it is a statute, I do not know.

Q. Tell me what you think it is. A. I have an understanding it is that we can not pay in excess of—GSA can not pay in excess of fifteen per cent of a real estate appraisal that they must secure in rental of a piece of property.

Under the circumstances of where the rental is more than \$2,000 a year, or where the exceptions are, there is national security involved, or some urgency that would make it in the public interest to negotiate a lease. But I am not a lawyer. I am not an attorney.

Q. You are not sure about the latter part.

(The Court) I think the witness has said he is not sure of anything.

(Mr. Liotta) Yes, sir.

(The Court) Is that correct?

(The Witness) That is my best understanding, Your (499) Honor. But I have nothing to do with that and that is not in an appraisal situation.

By Mr. Liotta:

Q. I am not trying to get a legal definition but in your understanding of the Economy Act when this building was completed, if the Economy Act was part of this agreement, if it was, that it could very well happen that Uncle Sam would not pay your \$388,092, is not that right? A. Thank you for refreshing my mind. I believe the Economy Act Clause is part of this lease. You say they would not pay \$388,000?

Q. I said it could happen. A. Then the U.S. Government would be breaching their agreement.

Q. I am not asking for a legal conclusion.

The Economy Act is part of this lease? A. That is correct.

Q. If the Economy Act says, in your opinion—what I am asking could very well happen, that the amount could be reduced, could it not? A. It is a legal question. I am not going to enter into that. If it could be, I am not aware of it.

Q. All right. Now, one of the essential parts of your (500) advice to me as a prospective investor would be, 'Mr. Liotta, I am also aware of the fact that these defendants in this case can build this building, that they have the know-how and so forth, to get this thing done.' Right? A. That is right.

(Mr. Liotta) Your Honor, at this point, if I may, in light with the other matters that we had discussed that will come up a little later, I would like to reserve further examination of Mr. Kolb with one exception.

By Mr. Liotta:

Q. Mr. Kolb, you were asked about the Pollin assembly and you were going to give the amount per square foot. Kindly give me that amount per square foot and tell me again— A. Of the assembly, the total assembly.

Q. Yes, that was the particular one wherein I had in fact entered an objection for the reasons stated. Do you want this—(indicating). A. No, no; thank you.

The total of the Pollin assembly, as I have documented it, which covers 628 and 638 D Street, Northwest, and 621 through 635 Indiana Avenue, Northwest, covered an area or included an area of 16,381 square feet, and assembled by Mr. Pollin for part at \$50, for part at \$42.60 and part at \$36 to bring about a total cost to Mr. Pollin for (501) the total assembly of \$610,000 or \$37.24 per square foot.

Q. Now, this property has been made into an office building, or in the process. A. A thirteen story containing 175,000 feet office building, with ground floor shops, was in January of 1963 under construction at an estimated cost of \$5 million.

Q. \$37.24 a square foot in January of 1963, right? A. \$37.24 as of January?

No, sir.

Q. December of 1962? A. No, sir.

Q. August, 1962. A. No, sir. He made an assembly of over more than a year.

Q. The assembled price was \$34.70. A. That is correct.

Q. I could throw a tennis ball at Pennsylvania Avenue if I had an office building there. A. Mr. Liotta, you might be able to, but I do not think Walter Johnson could.

Q. You can see Pennsylvania Avenue from there? A. You can see it.

Q. It is at the Apex of Indiana Avenue, is it not? (502) A. I would not quibble. I could hit a golf ball further than that. But it is a distance of around 225 yards.

Q. You can see Pennsylvania Avenue—it is right here.
A. You can see it. There is no question about that.

Q. There is the apex right there. A. Yes. Improved with buildings.

Q. Can you see Pennsylvania Avenue from the office building you are putting over here? A. I do not know.

Q. Would you say this property is better or worse than the subject property? A. As a matter of fact, I think you could. When I went through the building it was all shuttered up and I did not attempt to do any sightseeing.

Maybe not from the top floor. From the top two floors you could likely see it.

Q. You were lucky not to have an office on the 7th or 8th floor? A. Or on the Indiana side of the Pollin Building, yes, sir.

Q. All right.

(503) (The Court) I think the jury would like to know on the assembly where that took place.

(The Witness) The assembly started late in 1961.

(The Court) Have you got the index—have you got it indexed there?

(The Witness) I do not have it in my notes indexed. I have gone over from late 1961 to late 1963 and I was unaware—

(The Court) I mean you do not have the prices.

(The Witness) Yes, \$50.

(The Court) When was the \$50 paid?

(The Witness) The last sale, from my recollection, is \$50.00.

(The Court) How much was that per square foot?

(The Witness) Of the 16,000 square foot, it might have been about 8,000 feet of it. It was about 8 or something in that area of it. It was about half of the assembly.

(The Court) All right.

By Mr. Liotta:

Q. It is also common knowledge that, as you are making an assembly, you pay a little more and a little more as you get started toward the end of the assembly? (504) A. It frequently happens.

Q. Sometimes you pay a little more than what the market is paying for a specific piece of property in the same area? A. That is correct.

Q. So that is why you come back to your overall price? A. That is correct.

Q. You are not inferring that \$50.00 is the price of all of this land? A. I am saying that assembly cost \$36 and I adjust to that to reflect your opinion.

Q. Your cost to remodel this building, where did you get those figures—is it your judgment? A. There are several places the figures can be used.

Q. Where did you get it? A. One of the best places to get such figures are from builders active in downtown area of Washington in remodeling office buildings from printing presses, warehouses into office buildings. Their actual records are the best fact.

In addition to that the Beck's Engineering Course (505) Manual which comes out each month over the District of Columbia now and has been well accepted in the appraisal and building field as being quite authentic is another check.

Both were used.

I have broken down before me the cost factors individually that would go into this building that would bring me to an estimate of value, or an estimate of cost to remodel.

Q. You have broken it down? A. Individually.

Q. What builders did you contact? A. I will merely give Elmer L. Calavans.

Q. He is one of the leading construction people in the city. A. Elmer has remodeled—he tells me—some 2,000 apartment units, over one million feet of office space in Washington since 1945. Headquarters Building at 2,000 P Street, the Yater Clinic on Massachusetts; the Highland Apartments on Connecticut Avenue, the Georgetown Apartment at 2512 Q; the Army Times Publishing Company, M Street; the Macrae, the District of Columbia TB Building on Massachusetts, 1800 Eye Street, No. 1219—among others.

Q. That is very substantial. Were there any other (506) builders? A. It impresses me.

Q. It impresses me, too.

Were there any other builders you conferred with? A. I talked with George Allen Wick, whom I have known long and well, an engineer in cost analysis and engineer for Davis Wick Rosengarten, was another that I checked these figures against.

Q. He has a very impressive background, too. A. Yes.

Q. One of the leading engineers around. A. No question about it.

Q. I will accept your figures. Thank you.

(Mr. Liotta) Your Honor, if I may, I would like to reserve the right to recall Mr. Kolb at the proper time for further cross examination.

(The Court) All right. Mr. Kolb will be free to go on about your business until such time as we get in touch with you.

(Mr. Yochelson) If Mr. Liotta is going to recall him, I may not want to ask on redirect. But I do have certain questions on redirect that I want to ask him.

(507) (Mr. Liotta) I do intend to cross examine him further in the event certain things transpire. I cannot guarantee it.

(A short recess was taken.)

(Mr. Yochelson) It seems to me that Mr. Kolb's testimony has been so complete that I am not going to ask him any questions.

(The Court) All right. You may step down, Mr. Kolb.

(Witness excused.)

(The Court) You may step down.

(Mr. Yochelson) May we approach?

(The Court) You may.

(508) (At the Bench)

(Mr. Yochelson) The Court please, our next witness is a witness from the Woodmen of the World. I have not had a chance to speak to him.

Mr. Bernstein has. Will you permit Mr. Bernstein to interrogate this witness?

(The Court) Certainly.

(Mr. Liotta) I would like to make a motion and reserve the right to make a motion again if Mr. Kolb goes on the stand, to strike his testimony and request an instruction that the jury disregard his testimony on the grounds that, among others, he utilized the capitalization of hypothetical office buildings as an indicia of value, which I respectfully submit is in disregard of Your Honor's pretrial ruling as I understand it.

Further, that he has based his evaluation on a need attached to government transactions.

Further, that his valuation indicates value for frustration of plans: And in accordance with my understanding of the law, that defendants are not to be compensated for frustration of their plans.

(509) If that were the case—and accordingly, I ask Your Honor to strike all his testimony.

(The Court) Denied.

(Mr. Liotta) Thank you, sir.

(The Court) You are going to examine.

(Mr. Yochelson) Mr. Liotta has no objection. We have asked him.

(Mr. Liotta) I might add to my motion, Mr. Kolb completely ignored the best-evidence value, the sale of the subject property, itself, and his appraisal opinion is pure opinion not based on fact. I would like that as part of my request for the motion to strike.

(The Court) Well, now the Court understands that one of the main reasons is that Mr. Kolb testified he used the government's lease.

And also as the base for his capitalization.

(Mr. Liotta) Yes, sir, that is part of it.

(The Court) That is the \$388,000 per year.

(Mr. Liotta) Indicating the value, yes, sir.

(The Court) All right.

(In open court.)

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(510) (Mr. Liotta) Could we approach the bench again, please?

(The Court) Yes.

(At the bench.)

(Mr. Liotta) Your Honor, they intend to interrogate as to the Woodmen, what they allege is a commitment. I respectfully submit that until that data is found to be of the type of evidence that is admissible, I would ask that this hearing be without the presence of the jury and then this gentleman to be further subject to examination, if this commitment is found to be admissible, before the jury.

I submit that an examination now in the presence of the jury, and and if the matter is found to be not admissible, would be prejudicial to the United States.

(The Court) All right, gentlemen. You will be excused for a few minutes.

(Jury excused.)

(511) (The following proceedings were had out of the presence and hearing of the jury.)

(Mr. Bernstein) We call Mr. Hendrickson.

Thereupon

LLOYD L. HENDRICKSON

a witness called by counsel for the property owners, being first duly sworn out of the presence of the jury was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Bernstein:

Q. Will you state your name, please. A. Lloyd L. Hendrickson.

(Mr. Bernstein) I assume we are going at this point out of the presence of the jury. I do not intend to go through his whole testimony, am I correct in my understanding?

(The Court) Yes, sir.

(Mr. Liotta) Yes, sir, at this point.

By Mr. Bernstein:

Q. Your residence. A. Omaha, Nebraska.

Q. What business are you in? A. I am Assistant Investment manager for the Woodmen of the World Life Insurance Society.

(512) Q. What is the Woodmen of the World Life Insurance Society, will you describe it briefly? A. It is a fraternal insurance society.

Q. Does that society make investments? A. Yes, sir; we do.

Q. What work are you in in that society—is it in connection with the investment business? A. Yes, sir.

Q. How long have you been in that work? A. I have been in the investment department since 1934. That would be close to thirty years.

Q. And what is your precise title? A. Assistant Investment Manager.

Q. You have had that title for how long, sir? A. About ten years.

Q. Give us an idea—could you state an overall figure for the investments of the company? A. I have a book here. Our assets are approximately \$250 million.

Q. \$250 million? A. Yes.

(Mr. Liotta) Two fifty or two seventy?

(The Witness) Two-fifty. That is as of the end of the year.

(513) By Mr. Bernstein:

Q. In the ordinary course of the business of that society, if a situation arose where a mortgage proposal for a sale or lease were presented to the company, would you participate in determining whether or not that arrangement should be gone into? A. Yes, sir.

Q. Who else would participate normally? A. We have Mr. John Futcher.

Q. Would you speak louder and more slowly. A. Mr. John Futcher, who is the vice president and manager of the Investment Department, and I as his assistant, we have a mortgage loan manager, and one other party in the department. We would all work on a proposal.

Q. Now, would you describe this as the working team that does over a proposal to see if it is fit or not fit for the society? A. That is right. We, as a group, would get the statistics and recommend it to our investment committee, who is made up of the officers of the society.

Q. You say a proposal would be made to the investment committee then? A. That is right.

Q. That investment committee would then do what—approve or disapprove your recommendation? (514) A. That is right.

Q. Now, tell me specifically, if you will, a proposal with respect to the property sometimes known as 920 E Street, northwest, Washington, D.C., sometimes known as Merchants Transfer property, was a proposal for a financial arrangement with respect to that property submitted to your company? A. It was.

(Mr. Liotta) Objection.

(The Court) Overruled.

By Mr. Bernstein:

Q. Approximately when did you first have knowledge of that proposal? A. Well, a form of proposal was sent to us under date of October 10, 1962.

Q. Were you personally aware of that? A. I had inspected the property sometime in the middle part of 1962, approximately May of 1962.

Q. When you say you inspected the property, do you mean you personally came to Washington and physically saw it with your own eyes? A. Yes, sir.

Q. Then a proposal was submitted to the company in writing thereafter? (515) A. That is right.

Q. Did you participate in the ordinary course of your duties with the Company in going over that proposal? A. Yes, I did.

Q. Incidentally, do you have any connection whatsoever—and I mean by blood, marriage, business arrangements, with any of the parties who are owners of that property other than going over their proposal made to Woodmen of the World? A. None, whatsoever.

Q. Had you ever known any of them previously? A. Not prior to May, 1962.

Q. In other words, prior to entertaining a proposal that Woodmen give them a commitment? A. That is right.

Q. Have you ever met me before late yesterday afternoon? A. No, sir.

Q. Have you ever met Mr. Yochelson, my associate here? A. No, sir.

Q. And you are here at the request of the Court and counsel to testify in this case? (516) A. Yes, sir.

Q. Now, I gather from what you have just said that you participated in one of the team to go over this proposal for a commitment with respect to this property? A. Yes.

Q. Did you participate as part of that working team all throughout in determining what proposal should be made to your Board? A. I did.

Q. And, as a result, did that team with you, yourself participating, make a proposal to the Board? A. We did.

Q. Did the board act on that proposal? A. Yes, sir.

Q. Did the board act favorably or unfavorably? A. It acted favorably.

Q. As a result of the Board's action, was any document issued by the Woodmen of the World Society to the applicants in connection with this 920 E Street property?

(Mr. Liotta) Objection.

(The Court) Overruled.

(The Witness) Yes. We issued a commitment letter (517) under date of November 8, 1962.

By Mr. Bernstein:

Q. Do you by chance have the company's own copy of that commitment with you? A. Yes, sir.

Q. May I see it, sir? A. Here is a photocopy, and I have the original.

(Mr. Liotta) To save time, may my objection go to this man's testifying at all as to this commitment and as to any

of the transactions, so I will not have to keep interrupting counsel?

(The Court) Yes.

By Mr. Bernstein:

Q. May I see the original? You take your time. We have plenty of time. A. This is the original commitment letter.

Q. This document you just handed me is part of the original records of the Woodmen of the World Life Insurance Company? A. That is right.

Q. Part of the records kept in the ordinary course of business in connection with transactions and the transaction that eventuated in this commitment. (518) A. Yes, sir.

Q. Now, sir, I see certain signatures on here, and I am pointing to one in the middle of the page. Can you read what that signature says? A. "John F. Futcher."

Q. Do you recognize the signature? A. Yes, sir.

(Mr. Liotta) Object to that. That is contrary to Section 28 of the Federal Code, I respectfully submit, where it says:

"Handwriting:

"The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person."

"Respectfully submitted, Title 28, Section 1731."

Federal Rules of Civil Procedure—1963.

I submit to Your Honor there is no such handwriting submitted by this gentleman, Mr. Futcher. The comparison attempted to be made is incompetent. I object to it.

(The Court) Overruled.

(519) By Mr. Bernstein:

Q. I believe the question was, can you identify the signature? A. Yes, I can.

Q. Whose signature is it? A. Mr. John F. Fitcher's signature, Vice President and Investment Manager of our Society.

Q. A man with whom you worked in close and immediate professional business association for how many years? A. Approximately 25 years.

Q. Now, sir, was this original document which I physically hold in my hand transmitted or sent anywhere? A. That was sent to Mr. Alfred M. Bell, who was the broker for this transaction.

Q. And did the company then subsequently receive it back? A. Yes, we did. It is accepted.

Q. You received it back physically at some subsequent time? A. Yes, sir.

Q. When you received it back were there other signatures upon the document? (520) A. Yes, sir. David Lawrence, Albert P. Dicker and David H. Fromkin.

Q. What is the date above the signatures? A. November 14, 1963.

Q. Was that filled in when you received it back? A. Yes, sir, it was.

Q. For purposes of this preliminary inquiry, will counsel admit this to be the signatures of the people—to save time?

(Mr. Liotta) All right, sir.

(Mr. Bernstein) If the Court please, I think I have proceeded far enough to show the commitment is admissible. I take it the Court does not want me to go through the testimony of this gentleman.

(Mr. Liotta) Under Your Honor's ruling, I submit there are a number of other elements other than authenticity.

In paragraph 5, Your Honor ruled, it was a firm offer and a bona fide contract for \$2,800,000 as they represented in

their pretrial statement, and without prior knowledge to either party. The price was arrived at fairly and without coercion. Under these conditions as set forth in your pre-trial order, they have not met them.

(521) (Mr. Bernstein) I submit to the Court that we have shown there is no prior relationship between the parties. This is an independent Company with Investments of over \$250 million.

(The Court) The Court is interested in hearing from the witness as long as he is on the stand. He said he was here and made an investigation. The Court would like to know what investigation he made.

By Mr. Bernstein:

Q. You testified you, personally, inspected the property?
A. Yes.

Q. Anyone else in your company? A. Mr. John F. Fitcher and Mr. Phil Weaver.

Q. Did you see any kind of plans in connection with the property? A. We have preliminary plans here of the 920 building, and that is what we call it.

Q. Did you see any kind of an—any kind of a rendering of the property? A. We had a larger rendering of the property sent to us and showed what the remodeling would be eventually.

Q. Was it a larger scaled version than this? (522) A. About two or three times larger than that.

Q. One that you could hang on the wall of your office?
A. That is right.

Q. Was it hung on the Woodmen of the World's office?
A. For several months.

Q. Why? A. It was a beautiful building.

Q. Would it reflect pride in Woodmen's, the fact that they had agreed to investigate and to invest in this building? A. I believe so, yes, sir.

Q. In addition to having those plans and Mr. Fitcher's personally inspecting the property and you, personally inspecting the property and the addition of the rendering, did the team of Woodmen's go over any other material in connection with this property? A. We inspected the lease from GSA, a photocopy of the lease. We went over that.

Q. Do you have a copy with you? A. Yes, sir.

Q. Where did you get that copy? A. That was furnished us by Mr. Bell.

(523) Q. You have had it in your files for some considerable time? A. Since the original offering to us.

Q. You brought that as part of the official company file when you came here to testify? A. I brought the whole file with me.

Q. In addition to going over the lease, you analyzed the lease as to what impact it would have upon you as owner of the building? A. Yes, sir.

Q. What other kind of materials or documents did you go over? A. Well, we took into consideration the amount of the annual lease rental under this lease, deducting from that the operating expenses of course, and of course the lease rental that would have to be paid to our society. We analyzed that there would be over \$60,000 cushion.

(Mr. Liotta) May my objection run to all of this, Your Honor?

(The Court) It does.

By Mr. Bernstein:

Q. What do you mean \$60,000 cushion? A. This would be in excess, I believe it was around (524) \$60,000 from the information that was given to us.

Q. Let me see if I understand you. A. Yes.

Q. Do you mean that after the building was up, after paying the payments required of your mortgage, after paying the operating costs for your building and taxes and

all expenses, the owners would still have better than \$60,000 left to put in their own pockets? A. Yes, sir.

Q. You mean \$60,000 or better per year? A. Yes, per annum.

Q. In addition to what the building would be worth—

(Mr. Liotta) I object to counsel's leading the witness, Your Honor.

(The Court) Counsel can rephrase the question.

By Mr. Bernstein:

Q. Is it correct to say that in addition to what the building was worth to the Woodmen of the World—

(Mr. Liotta) Objection. It is a leading question.

(Mr. Bernstein) Can you object before I finish the question?

(525) May I finish the question?

(The Court) Yes, surely.

(Mr. Bernstein) I will restate it.

By Mr. Bernstein:

Q. Is it correct to say, then—do I understand that what you are saying then is that, in addition to the return of its investment which the Woodmen of the World, itself, would receive each year, that your calculation showed that the owners would, themselves, each year return to put into their own pockets, in excess of \$60,000?

(Mr. Liotta) Objection. He is leading the witness.

(The Court) Overruled.

By Mr. Bernstein:

Q. Will you answer the question? A. That is right.

Q. Now, it is a—let me begin over.

Did a large part of that experience concern going over that mathematical calculation to determine what kind of

income can be expected from buildings and how that income might be assignable as against cost or profit or return on investment? Did you deal with these figures? A. Yes.

Q. And you are much experienced in doing that? (526)
A. Yes, sir.

Q. And incidentally, at the time the Woodmen of the World issued this document which is labeled "Commitment Letter," was there any information whatsoever known to the Woodmen of the World about any possible condemnation of this property by the Federal Government?

(Mr. Liotta) Objection. He can only answer for himself.

(Mr. Bernstein) To your knowledge, I said.

(The Court) Yes.

(The Witness) No, there was not.

By Mr. Bernstein:

Q. Now, after you issued this letter and then the letter came back signed as you indicated, did any money come with it? A. Yes, sir. We required a \$14,000 good-faith deposit be deposited with us.

Q. So that the people to whom this commitment issued put up \$14,000 with your company? A. That is right.

Q. And why was that deposit required?

(Mr. Liotta) Objection. It goes in direct violation to Your Honor's ruling.

(The Court) No. The Court is very much concerned (527) with why the alleged seller would be putting up the good-faith money.

By Mr. Bernstein:

Q. Why would the person who got this commitment from you—who eventually would sell you the building and then you would lease it back to them—why would they put up

the deposit and why is that required? A. We require such a deposit on all such transactions. That is to prevent us from doing a lot of work on a transaction and then at a later date, the seller might back out of the transaction.

(The Court) Wait just a moment. The Court is concerned when you say "a lot of work."

What work did you do?

(The Witness) Well, there were two or three of us that inspected the properties.

(The Court) That was done before the \$14,000 was deposited?

(The Witness) Oh, yes.

(The Court) What work—what investigation did you make?

(The Witness) Well prior to the commitment—

(The Court) In other words, what is your background in the valuation of property?

(528) (Mr. Bernstein) Perhaps I can clear this up: \$14,000, Mr. Hendrickson, that would be applied to the credit of the purchasers if the transaction went through, would it not?

(The Witness) If the transaction had gone through, we would refund the \$14,000 to the seller of the property.

(The Court) And if it did not go through?

(The Witness) We would retain it.

By Mr. Bernstein:

Q. Do you mean if it did not go through on whose fault?

A. In this particular case, it was condemnation proceedings and we did refund it because it was unforeseen circumstances, but ordinarily if the seller backed out on his own accord, we would retain the \$14,000.

(The Court) Yes, Mr. Hendrickson, the Court is con-

cerned when you say you came to Washington and looked at the property.

(The Witness) Yes, sir.

(The Court) Are you an appraiser?

(The Witness) Not a licensed one, no.

(The Court) Did you have an engineer with you?

(The Witness) No.

(The Court) And you, personally, inspected the property?

(529) (The Witness) I did.

(The Court) Now, were you in the company of Mr. Lawrence, Mr. Dicker or Mr. Fromkin?

(The Witness) Mr. Bell and Mr. Dicker.

(The Court) Who is Mr. Bell?

(The Witness) He is the broker who brought this transaction to us.

(The Court) Well, did you retain anyone?

(The Witness) No, sir.

(The Court) You just looked at the building?

(The Witness) Yes, sir.

Now, we do all the time. I mean, anything of this size that we invest in, we always make a personal inspection.

(The Court) Don't you ever hire an engineer or a person qualified?

(The Witness) We require, before the transaction is closed, that we have an appraisal by an AMI.

(The Court) Was one furnished to you?

(The Witness) No. Our commitment letter was written on the basis that before we paid out the money, we should have AMI appraisal of the property to substantiate the cost that we were going to pay for the building.

(530) (Mr. Bernstein) I think I can help Your Honor for a moment, if I may.

By Mr. Bernstein:

Q. Did you or did you not consider this a binding agreement as far as Woodmen of the World is concerned? A. Yes, we considered it such.

(The Court) That is exactly what I am concerned with.

(Mr. Bernstein) Right now—

(The Court) Mr. Hendrickson had just got through saying that it would be subject to—

(Mr. Bernstein) We have already put in evidence what the building—by qualified appraisers, what the building would do.

(The Court) What the Court is interested in and the Court would like some help on it—that this is a binding commitment.

(Mr. Bernstein) Would Your Honor look at it?

(The Witness) It is.

(The Court) Didn't you just get through saying that it would be "subject to the appraisal"?

(The Witness) May I read this part to you regarding that?

(531) (The Court) Yes.

(The Witness) All right.

"The Society agrees to pay a sum not to exceed \$2,800,000 or the appraised value of the property, whichever is the lesser."

May I state this, under Nebraska statutes, we are required—we are permitted to buy property such as this, not to exceed the appraised value.

By Mr. Bernstein:

Q. Mr. Hendrickson, in any mortgage work, whether it

be on straight mortgage or sale-lease as this was done, is it standard or conventional for all of the commitments which are binding upon the mortgage company's whether a sale-lease pack, isn't it fair to say upon proof of good title and—

(Mr. Liotta) Counsel is leading the witness and asking for an answer.

(Mr. Bernstein) This is not before the jury. The contract will speak for itself. The contract is completely binding. Any mortgage in the world that is issued for any mortgage company is subject to good faith and appraisal. You have to prove good title before their money is delivered and you have to have a supporting appraisal.

(532) We have shown what supporting appraisal would do. But what I am submitting on the face of the agreement, it makes the lease of a binding agreement and the cheese was made binding by \$14,000 payment.

May I proceed, Your Honor?

(The Court) Certainly.

By Mr. Bernstein:

Q. Forgetting legalisms now, what was the basic function of the man who applies for a commitment? A. To bind the commitment and to reimburse us for any time or so that we spent in having and holding in readiness any money that might be for this commitment.

Q. To use a colloquialism, if I may for the moment, isn't it making the man who wants the mortgage money, put his money where his mouth is, to be serious? A. That is right, yes.

Q. Now, as far as your company was concerned— your lawyer participates in these commitment decisions, too? A. Yes, he does.

Q. Did your company's general counsel participate in the decision of this case? A. Yes, and we had an assistant general attorney that participated.

(533) Q. And from your discussion with them and like commitments, did they consider the company bound to deliver the money when requested by these gentlemen in the event the appraisal did—

(Mr. Liotta) I object—

(Mr. Bernstein) I said based on discussions?

(Mr. Liotta) I object to the question.

(The Court) Overruled.

By Mr. Bernstein:

Q. Now, how many office building projects has your company either now or at any time, had investment in by way of mortgages or sale-lease back—or any other form?

(Mr. Liotta) Objection. I will object, Your Honor; irrelevant.

(Mr. Bernstein) To show experience in dealing with calculations.

(The Court) Overruled.

By Mr. Bernstein:

Q. Give me approximately—I do not ask how many you own now, or how many do you own now, or how many have you owned at some time or other? A. Real estate properties, in excess of 75.

Q. In excess of 75? (534) A. That is right.

Q. How many office building properties has your company had under consideration in the time you have been with them? Strike that a moment.

Would it be a fact that many times the proposals are submitted which you do not accept? A. That is right.

Q. That you do not commit against? A. That is right.

Q. So, if you have bought an interest or acquired an interest in 75, how many have been presented to you which you participated in and analyzed? A. I would say probably three times that many.

Q. So that you personally have participated in analyzing all the financial data with respect to maybe 225 office buildings? A. Oh, approximately.

Q. And you did it in your official capacity with the company, and in order to assist in making the determination whether this investment should or should not be made? A. That is right.

Q. Incidentally, do you have with you the format minutes of the Board which considered the recommendation of the working people as to whether this commitment (535) should issue? A. Yes, I do.

Q. May I see those, sir?

(The Court) Is Mr. Hendrickson an officer?

(The Witness) No, sir. I am not.

(Mr. Bernstein) If the Court please, for the purposes of inquiry, I do not believe I offered it. I will offer in the original minutes and this other document with the understanding we will be able to submit photo copies.

(The Court) Hold them until Mr. Liotta sees them.

(The Witness) I have photo copies here.

(Mr. Bernstein) These minutes are quite informative as is the commitment, itself.

(The Court) All right.

By Mr. Bernstein:

Q. Incidentally, what rate of return on its ownership of the buildings would the Woodmen of the World receive under its binding commitment? A. At the rent that we computed, this loan which was a constant of 7.74 per cent per annum, would net our society 6 per cent and complete amortization within the first 25 years.

(536) Q. In other words, does the Society work on a basis of return to the company plus amortization of 7.74 combination? A. Yes, sir.

Q. Was that standard with your society during that period of time? A. That was the going rate.

Q. Now, in connection with the issuance of this commitment, did any of the people of your company take any consideration of the location of this property? A. We certainly did.

Q. When you say you certainly did, what do you mean by that? A. Well, it was a very good location. We felt that it was a very desirable area. We felt that the location would always be desirable and we would not ever have to be concerned about leasing it, if it ever came in to our hands. I mean, the lease was broken or anything.

Q. Was its proximity to the so-called "Federal Triangle" any factor in your consideration? A. Yes, sir, it was.

Q. In what way was that a consideration? A. We felt that near that triangle would be a very desirable place for any other government offices.

(537) Q. Incidentally, over here on the board—and I realize you are seeing at quite a distance—I will not ask you to step down but in pink is the whole property. Strike that.

Do you remember generally what the property consisted of? A. Yes, I do.

Q. What did it consist of? A. Well, according to our submission, it was an eight story building with basement and a six-story annex containing approximately 20,000 square feet.

Q. Was your commitment against those improved portions of the property? A. Yes.

Q. Did your commitment extend or cover at all the unimproved parking lot adjoining? A. We did not—we were not getting the parking lot.

Q. In other words, that parking lot area would still belong to the owners who were applying to the commitment, is that correct? A. Yes.

Q. Now, was there anything in the considerations by your company as to whether or not to issue this commitment was out of the ordinary and different from your technique (538) or approach on any other property submitted to you for your consideration? A. I do not believe so.

Q. This was treated in a routine conventional and ordinary manner by your company? A. Yes, sir.

Q. Were there any special influences of any kind brought to bear to cause you to issue the commitment? A. No, sir.

(Mr. Bernstein) If the Court please, I offer in evidence for the purpose of this qualifying inquiry, both the original commitment of November 8, 1962 and the minutes of the Board meeting of November 7, 1962, again with the request that substitution be allowed. I submit to the Court that those documents, together with the testimony of the witness, reflects, first, that this was a transaction made in the ordinary course of the business under no duress nor special circumstance, or the like.

There is no relationship between the parties and it was done with an independent company with over \$250 million of investments and done with informed people who acted on the basis of personal information about the area, economic information about the building and how it would work out, (539) upon the basis of experience considering 225 other office properties.

Third, that the commitment, itself, is a completely binding contractual arrangement both by the testimony of the witness and the documents which will speak for themselves; that this company was duty bound, by law, to deliver \$2,800,000 for these improved properties when the improvements were completed, and that the two conditions that were a part of this contract, with respect to those two conditions—the conditions about the government lease has already been offered in this case, that that condition was satisfied, and with respect to what the building would appraise out, there has already been one witness before the Court, and I suggest to the Court there will be another, both of whom will support the fact that it would appraise out

for substantially—I am talking about the improved properties now—in excess of the \$2,800,000 figure as stated there.

Therefore, I submit to the Court there is no question as to the competency of the evidence.

With respect to its probative weight, that is a matter for the fact-finder of the jury.

I request the jury be recalled and this witness (540) permitted to testify.

(Mr. Liotta) Of course I object to that.

I might say preliminarily, I might submit that none of your rulings under 5—they stated in their pretrial statement this was a firm contract for \$2,800,000. This is contrary to this witness testimony.

I would like to cross examine the witness if I may.

CROSS EXAMINATION

By Mr. Liotta:

Q. Mr. Hendrickson, you were asked by counsel—and he used the word “mortgage”—is that what this was? A. No, it was not a mortgage. It is a purchase lease back.

Q. With the situation running from the seller to you, instead of from buyer to the seller, is that right? A. I do not understand that.

Q. You were the buyer? A. Yes, we were.

Q. And the \$14,000 that counsel was talking about, ran from Mr. Dicker and Mr. Lawrence and Mr. Fromkin, I presume, to you? A. Yes, sir.

(541) Q. Now, your own “commitment.” Were you under a binding commitment to pay \$2,800,000 on November 8, 1962 under this commitment? A. As stated in our commitment letter, \$2,800,000, or the appraised value, whichever is the lesser.

Q. So that instead of \$2,800,000, if appraised, it could have been \$2 million you paid? A. It is possible.

Q. It also could have been \$1,500,000? A. It is possible.

Q. It could have been \$1 million, possibly? A. Well, it is possible.

Q. You never had an appraisal made in conformance with your commitment, have you? A. No.

Q. So, therefore, it was not a binding agreement on you in so far as the only thing that counts, and that is price, is that right? A. That is right.

(Mr. Bernstein) Whether or not it is binding does not depend upon what Mr. Liotta thinks. It depends upon the law. This contract is binding whether it is \$2 million 8 or what.

(The Court) Wait a moment. Let us get through with the testimony.

(542) (Mr. Bernstein) I object to the question.

(The Court) The objection is overruled.

By Mr. Liotta:

Q. The lease also provided—I withdraw that.

Your commitment letter also provided that it is unqualifiedly contingent upon a government lease, isn't that right? A. That is right.

Q. Without the government lease, you would not have had a commitment, either, would you? A. That is right.

Q. So, the \$2 million 8 was not \$2 million 8. In other words, as you previously stated, it could have been a lot less? A. It could be.

Q. And you never had an appraisal made by anyone? A. Our only calculation, that is all.

Q. I am talking about an appraisal as provided in this agreement. A. That is right.

Q. Now, did you have any knowledge at the time you were considering this commitment as to the proposed

Federal Bureau of Investigation Building project in (543) in that area? A. We did not.

Q. Can you talk for Mr. Fitcher, who is not here? A. Yes.

Q. Do you know he does not have any knowledge, either? A. I know that because of our discussions. We were quite surprised when we received this notice of the condemnation.

Q. Isn't it a fact that no appraisal would have been made of this property until and unless the building was completed? A. Yes.

Q. And at that time and that time only your company would then do whatever they say they are going to do under this commitment, is that right? A. Yes.

(Mr. Liotta) May I have the minutes?

By Mr. Liotta:

Q. Now, these minutes include, among other things, references to other properties, do they not? A. Yes.

Q. Kindly draw a pencil line as to where the other properties stop and this property ends. A. Could I do that on a photo copy here.

(544) Q. I do not mind. Go ahead.

(The Court) Could I interrupt? Let me take both of those and read them, because I do not know what you are talking about.

We will take a few minutes. Incidentally, I have excused the jury until 1:30, because after the testimony on this, the Court may want to hear from counsel on it.

(Short recess.)

(Mr. Liotta) No further questions.

(Mr. Bernstein) May I clarify some things?

(The Court) Yes.

REDIRECT EXAMINATION

By Mr. Bernstein:

Q. This \$14,000 that was mentioned as put up as a good-faith deposit, is that what is commonly known in the entire mortgage insurance industry as a standby faith? A. No, it is a good faith deposit.

Q. Does it have the effect of a standby faith? A. I do not know what the difference would be.

Q. Is one of the purposes so that once the money has been put up and you have issued a commitment, the person does not issue the commitment somewhere else? A. Yes.

(Mr. Liotta) Objection.

(545) (The Court) I do not hear you, Mr. Liotta.

(Mr. Liotta) I object. Leading.

(The Court) Yes.

By Mr. Bernstein:

Q. Was one of the purposes of this fee being put up—
A. May I explain why we do it? This has happened many times.

Someone will come on in to us for either a loan or commitment such as this, a purchase lease-back; when that happens, we issue a commitment letter which is a contract so far as we are concerned. This commitment letter is taken to local lending agencies, banks, and so on, They are permitted—and you borrow money on our commitment letter—

Q. Can I interrupt you? A. Yes.

Q. In other words, is it your experience that, based upon similar commitment letters, \$2 million 8 or appraised value, that the man that gets a commitment letter can go in and borrow construction money in a bank? A. Yes. Inter-finance. Sometimes when the property is completed, a buyer or seller—as in this case, feels that they can get more money or a bigger loan, (546) maybe, they will go shop some place else and if they are able to get more favorable interest rates

and so forth, they will take the other offer for the other financing.

This is just a protection for such incidents.

Q. A part from your particular company, take the entire insurance industry which make mortgages or lease-back, is it standard practice to have such a deposit? A. It is.

Q. Is it standard practice for the commitments that issue throughout the industry apart from your company, to have a clause while the building is yet in construction or not yet completed or has not been started, to have a clause "X" dollars or appraised value? A. I believe so. We always do.

Q. That is just a statutory protective measure, in other words? A. Yes.

Q. You went over the actual figures in this proposed—
A. I did.

Q. You went over the footage that was in the building, the amount of footage.

(Mr. Liotta) Object. We have been all over this before. He has answered and now he is making more answers more in line—

(547) (Mr. Bernstein) Your question on cross as to possibilities. It is right in line with the cross examination.

I will withdraw that question.

By Mr. Bernstein:

Q. Do you recall, Mr. Hendrickson, Mr. Liotta's question to you whether or not it was possible to appraise of \$2 million 8, or \$2 million 5, or a million—do you recall those questions? A. I do.

Q. You said it was possible? A. Yes.

Q. Now, based on your own examination of the calculations of the size of this building and the tentative plans and computations that you, yourself made, in your opinion, what would the building appraise out for when completed?

(Mr. Liotta) Objection. He never made such an appraisal.

(The Court) You have not, have, you?

(The Witness) Your Honor, this is the appraisal that I made, and we considered in our society, there is 130,000 feet, and as a rule of thumb, generally you are lucky to have an office building constructed for (548) much less than \$20 a foot.

You compute \$20 a foot on a hundred and thirty thousand square feet and you come up with an estimated appraisal of \$2 million 6. That is exclusive of the land. That is the basis on which we made our calculation.

Now, this statement of whether or not it could appraise for any amount, it would be impossible, or improbable that it would appraise for a million—

(The Court) Let me ask you this and this is what the Court is interested in.

(The Witness) Yes.

(The Court) You say you have about two hundred and what commitments, I mean, investments?

(The Witness) We have probably considered two hundred or two hundred fifty. We have in excess of 750 on our books now.

(The Court) Do you have any analogous to that?

(The Witness) We have not got anything leased to government agencies.

(The Court) Do you have anything where it is a converted building?

In other words, are you testifying that this was to be a new building?

(The Witness) No. But the remodeling, which (549) it was—and this is something else we took into consideration—this was a warehouse substantially constructed. It would house the modern computers today. We thought it was a

good sound structure and would adapt itself to the use to which it was to be put.

(The Court) Well, that is subject to the appraisal after it was completed?

(The Witness) Yes, sir.

(The Court) Now, how many of your investments are here in Washington?

(The Witness) We have only one.

(The Court) Where is that?

(The Witness) That is the Esso Building.

(The Court) Right across the street?

(The Witness) Yes, right across the street.

(The Court) That was a new building?

(The Witness) Not when we bought it. Not when we loaned on it. This is a mortgage loan on this building.

(The Court) You did not retain anyone here in the engineering field nor appraisal field?

(The Witness) No. We were going to depend on the appraisal when the construction was completed.

(The Court) And you were not to have a resident engineer during—

(550) (The Witness) We usually do not do that, no.

(The Court) All right.

By Mr. Bernstein:

Q. In terms of modern offices, you had tentative plans on this building? A. Yes.

Q. In terms of the end result in any office building, is that end result—assuming you have a proper basic structure—is that in your experience and all the buildings you have seen or had to do with, different from whether the skeleton pre-existed or was all built at one time?

(Mr. Liotta) Objection.

(The Court) The Court understood Mr. Hendrickson to say you had not had this experience before?

(The Witness) Not with a government agency. We have had remodeled buildings that we have loaned on.

(The Court) How old is this building?

(The Witness) Let's see.

I could not say.

(The Court) And what part of it was to remain? How were they to convert it?

(The Witness) If I remember right—

(The Court) Wait just a minute. The Court expects you to remember right.

(551) (The Witness) All right.

(The Court) Because you have \$2 million 8 of your fraternal organization's money riding on this, you say?

(The Witness) All right.

We understood that the floors would be the way they were, the outside walls would be the way they were, there were windows and screening around, and the outside structure—I do not know if there was to be a complete new outside structure or not. I do not remember, but it was going to be quite modern in design when it was completed.

It was quite radical, the remodeling job, as far as the outside structure was concerned.

By Mr. Bernstein:

Q. Was the outside skeleton to remain? A. Yes.

Q. Was that outside skeleton better, worse or the same as in general modern office construction which you have seen? A. We thought it would be better because of the heavy construction for storage purposes. It was a warehouse. We felt that it would be a sound building when it was completed.

(552) Q. Did the Woodmen of America engineer look it over? A. No.

(The Court) Did they look over the plans?

(The Witness) Yes, what plans we have here.

(The Court) What?

(The Witness) The plans that we have here, yes. We considered the architect's rendition from the outside, and then the floor plans that were submitted to us.

By Mr. Bernstein:

Q. Based upon your experience, and you have testified you have looked at some 225 office buildings and your company has actually— A. That does not mean office buildings. That is all properties.

Q. Right. But based upon your experience with office buildings and the end result values that are given to you by appraisers and based upon your own dealing with figures, have you seen any modern office buildings—I am talking about multi-level, of course, like this building, or more—that the building itself, completed in a modern fashion was worth less, let me take a low figure—\$18 a foot?

(Mr. Liotta) I object. That has so many ramifications. It is irrelevant. The witness made his answer and he did not appraise the property and I object to it.

(553) (Mr. Bernstein) All right.

By Mr. Bernstein:

Q. Have you gone over the figures and what you were told by the commitment request was going to be built, and evaluated what that building would be worth when it was completed?

(Mr. Liotta) Object to that.

(Mr. Bernstein) I said evaluate.

(The Witness) We calculated it on the basis of \$20 a foot.

By Mr. Bernstein:

Q. That was based upon your experience with the properties you had looked over or invested in? A. Yes, sir.

(Mr. Bernstein) I submit that that experience, where people lend money on that basis or buy on that basis is just as valuable or just as valuable as a former appraiser would be.

(The Court) When you say the amortization period, that was what?

(The Witness) 25 years. That was the first lease, 25 years. Then it had 21 year renewals at the same rent, in the number of three.

By Mr. Bernstein:

(554) Q. Your amortization was based on what lifetime for the building? A. Well, we are required by law to amortize the property during the prime lease period, which, in this case, was 25 years.

Q. Was that your own figure—that was because of a requirement of law, right? A. That is right.

Q. Did that have any relation of your or to your expected lifetime of the building?

(Mr. Liotta) Objection. The agreement speaks for itself. He is attempting to alter terms of a written agreement. I submit it is a 7.74 per cent and the witness has testified 25 years economic life.

(Mr. Bernstein) The witness has already testified to the 7.74 was inclusive of depreciation.

(The Witness) And six per cent amortization.

(Mr. Liotta) That is exactly right. 7.74 which means a return on capital for 25 years.

(The Witness) Of course we had three 21-year renewals years, too.

(The Court) Any further questions?

(555) (Mr. Bernstein) No.

(Mr. Liotta) No questions at this time, reserving, of course.

(The Court) All right.

You may step down, Mr. Hendrickson.

(Mr. Liotta) Will the witness remain at this time in the event we need him again?

(The Court) Oh, certainly, certainly.

(Mr. Liotta) I respectfully submit that the provisions of your pretrial ruling No. 5 have not been complied with, to-wit, (1) they are attempting to utilize this commitment not to show the highest and best use of the property and as an indicia of value.

No. 2, that it was not a firm offer and I respectfully point to the testimony of the witness, himself.

Now, Your Honor, this commitment, according to his own testimony, was contingent upon a government lease, special need of the United States, and did not conform with the type of evidence that would have any effect upon this case or the issues in this case.

The only issue submitted is the fair market value as of the date of taking. I refer Your Honor to *Shumaker v. United States*, 147 U.S. cited in my brief. There the Supreme Court in reviewing an instruction given to the Commissioners on the Rock Creek (556) Park Case, said that, in effect, bona fide contracts of sale are sales made before the passage of the Acts.

That, I submit, refers to bona fide firm contracts as set forth in there. This was not a firm contract.

To allow this into evidence would present before this jury not only something which I submit is incompetent, but would prejudice the United States to the extent that this jury would then be in the position, and be swayed, possibly, to the fact that this company was going to pay \$2 million 8

for this property, and that that, in effect has something to do with the fair market value as of the date of taking.

I submit, sir, that the building was not there. I submit that would be highly prejudicial.

I might say, also that a frustration would be the outcome of this thing to the extent that I believe the jury again would take into consideration the frustration of plans of the owner, if that be the case, and would tend to compensate therefor.

It would also possibly indicate a \$2 million 8 sale price which was not so.

(The Court) That is what the Court is interested in. How does it hurt you?

(557) How much is it going to cost?

How much did Mr. Hendrickson say that in their opinion the building was to cost?

(Mr. Liotta) Well, in his minutes, he said \$1 million 8—\$2 million 8, which was in excess of what Mr. Kolb said.

(The Court) Yes.

In other words, the Court is not interested in how you try the case, but the Court has before it the question of this particular agreement.

(Mr. Liotta) Yes, sir.

(The Court) Doesn't this agreement run contrary to a great extent to Mr. Kolb's testimony?

(Mr. Liotta) Yes, sir, to a great extent it does.

However, Your Honor, if I may say that under Sharp v. United States, this falls right in that category. If this was anything at all it was an offer, I submit, one way or the other, I do not know what was being offered or to whom, but that was what it was.

(The Court) I realize that there is another piece of property.

(Mr. Liotta) Yes, sir, so do I.

(The Court) What, fifteen thousand feet?

(Mr. Liotta) It is the front property, Your Honor.

(558) (Mr. Bernstein) 13,000 feet.

(Mr. Liotta) I will accept that.

But it is another piece of property. Of course, what could very well be indicated here by the jury is two million eight, that they were ready to pay, let's throw away the sale that the owners paid for this property ten months before and add on some land value for that front piece—

(The Court) But the point that the Court is interested in, is that it is two million eight, after they spend a million eight.

(Mr. Liotta) Yes, sir.

(The Court) If they do not spend a million eight, the Woodmen do not have to take it.

(Mr. Liotta) It does not appraise—in other words, they do not construct it. I follow you.

(The Court) So that it leaves them with the fifteen thousand feet.

(Mr. Liotta) Over and above the amount—I understand.

(The Court) So, isn't that very much contrary to Mr. Kolb's testimony of what—four million?

(Mr. Yochelson) Two million five, deducting costs of construction, Your Honor.

(559) (Mr. Liotta) It is very much contrary, Your Honor.

I certainly would expect to attack the credibility of all of this testimony. However, my point goes to the legality of this particular agreement, and the relevance it has before Your Honor in this Court. If we allow offers to influence us, I respectfully submit that we are going beyond the type of evidence that the Supreme Court has laid out as being admissible in this type of case.

(The Court) I do not think the Supreme Court ever had a case like this one, Mr. Liotta.

(Mr. Liotta) Maybe. I say that respectfully, Your Honor. But the Supreme Court has had this before them, I think, Your Honor, the question of what type of evidence is admissible in so far as contracts of sale, offers, or bona fide sales that took place, and options.

The Supreme Court has stated (1) that completed sales are good evidence, the best evidence.

I submit that the Court has stated that options, because of the fact that there is a possibility that one party or the other party may withdraw, have been excluded.

I respectfully submit that this goes to this (560) type of agreement here where it takes the form of an option to buy.

I would say we had a firm contract under those conditions, but the price is not firm here. It is too innate or what-have-you.

(The Court) The Court will take it and be prepared. I do not know what the ruling will be at this time, but be prepared to have Mr. Hendrickson here at one-thirty if you are going to use him.

(At 12:15 p.m. the trial was recessed until 1:30 p.m.)

AFTERNOON SESSION

1:30 p.m.

(The jury is absent.)

(The Court) Anything further on the agreement, gentlemen? Because the Court is to rule that the testimony is admissible, so we will proceed.

(Mr. Liotta) May my objection be noted on the record to the admission of this type of testimony into evidence for reasons heretofore stated and my briefs, arguments and statements made before in this trial.

(The Court) The record will so reflect, Mr. Liotta.

(Mr. Liotta) Thank you, sir.

(Mr. Bernstein) May I have those original documents back?

(Mr. Liotta) May I request that, in reference to the minutes, in light of Your Honor's rulings, the minutes not be admitted, rather be read to the jury, because it refers to other property. It refers to this property, and that is one thing but the reference to the other property has no relevance.

(Mr. Bernstein) That is agreeable. I will do it only to the point concerning this.

(The Court) Yes.

Bring the jury in.

(562) (Mr. Bernstein) May be substitute photographs?

(Mr. Liotta) Subject to my objection, we may substitute photocopies.

(The jury is in the box.)

(Mr. Bernstein) May I have them marked?

(Mr. Liotta) I would like to look at them. Is this the same copy of the copy that you gave me?

(Mr. Bernstein) Yes, sir.

(Mr. Liotta) That is satisfactory, counsel.

(Mr. Bernstein) Suppose you erase that. That is in pencil.

(Deputy Clerk) Plaintiff's Exhibit 3.

Defendant Exhibit No. 3 in evidence.

(Defendant Exhibit 3 received in evidence.)

(The Court) Come up here, gentlemen.

(Discussion off the record at the bench.)

(Mr. Bernstein) We call Mr. Hendrickson.

Thereupon

LLOYD L. HENDRICKSON

a witness called by counsel for the property owners, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

(563) By Mr. Bernstein:

Q. Mr. Hendrickson, all would appreciate it if you would speak loud and clear and slowly so that the end juror can hear you as well as the Court.

Q. State your full name. A. Lloyd L. Hendrickson.

Q. Where do you reside? A. Omaha, Nebraska.

Q. Did you just come from Omaha under the request of the Court and counsel to testify in this case? A. I did.

Q. And what is your employment, sir? A. I am Assistant Investment Manager for the Woodmen of the World Life Insurance Society.

Q. Would you describe what the Woodmen of the World Life Insurance Society is. A. It is a fraternal life insurance society.

Q. Now, in the course of business of that society, does it have occasion to invest money? A. Yes, we do.

Q. To what extent presently has it invested—get the gross dollar figure of its investments. A. As of now, we have in excess of \$250 million of assets. Approximately \$230 million is in securities, investment mortgages, bonds and so forth.

(564) Q. Incidentally, do you appear here today in this Court with authority of your company? A. Yes. At the request of the Court, of course.

Q. How long has the Society been in business, sir? A. Seventy-four years.

Q. And again, what is your precise position in the company? A. I am assistant investment manager of the Investment Department.

Q. What are the functions of the investment department of that company. A. To consider investments for the society. We consider investments and submit them to our investment committee which is made up of four executive officers of the Society.

Q. When investments are considered, who are the personnel of the company who come in to play in that consideration? A. Well, there is Mr. Fitcher, who is vice-president and investment manager; myself, as assistant to Mr. Fitcher, and we have a mortgage loan man, and we have the assistance of Assistant General Attorney.

(565) Q. Mr. Hendrickson, if you would just keep your voice up and speak a little bit more slowly, it will be easier to hear you. A. I am sorry.

Q. So that this team that considers investments is composed basically of four persons as we understand it, the manager of the department, you, a mortgage man, and your assistant General Attorney. A. And then we do have a couple of analysts—if we need them. We call them in if we need them.

Q. What kind of analysts? A. Accountants and versed in analyzing securities and financial statements.

Q. Does your company with any frequency have submitted to them proposals to finance office buildings? A. Yes, sir, we do.

(Mr. Liotta) May my objection run to all of this testimony so I do not have to continue?

(The Court) It will, Mr. Liotta.

(Mr. Liotta) Thank you, sir.

By Mr. Bernstein:

Q. Do you personally participate in those submissions to the company for financing or purchase? (566) A. I do.

Q. As I understand, you have been in this work personally for 35 years? A. No. I have been in the investment department since October, 1934.

Q. You have been in there something like thirty years? A. Practically thirty years.

Q. Well, specifically, sir, did there come a point of time when your company to your knowledge, had submitted to it some proposal with respect to financing or purchasing a property known as 920 E Street, Northwest, Washington, D.C. A. Yes, we did.

Q. That property is sometimes known as Merchants Transfer property? A. That is right.

Q. When did that occur and when did it come to your attention? A. The formal submission was made to us October 10, 1962.

Q. 1962? A. Yes, sir.

Q. Now, prior to that formal submission, had you had any connection with this property or any proposal (567) with respect to the property, or looking at it or anything of that character? A. Yes, I was in your city—

Q. You mean here in Washington, D.C.? A. Here in Washington, D.C. in approximately May of 1962, to look at some other property.

Q. What was the other property? A. The Evening Star Building.

Q. If I may divert for a moment—at the time you looked at the Evening Star Building, what was its state?

(Mr. Liotta) Objection. Completely irrelevant.

(The Court) What is the relevancy?

(Mr. Bernstein) Shall we state it here?

The relevancy is that the Evening Star Building was the office building for another use—

(Mr. Liotta) If Your Honor please—

(The Court) We are having enough trouble. Let's stay with the subject property.

(Mr. Bernstein) The relevancy is that it was remodeled—

(Mr. Liotta) Excuse me, Mr. Bernstein.

(The Court) Come up here, please.

(568) (At the Bench.)

(Mr. Bernstein) His own personal inspection of the Evening Star Building will show his own opinion as to what can be remodeled, what the result of remodeling can be.

(The Court) He does not know anything about it and you know he does not know anything about it.

(Mr. Bernstein) Yes, sir; he does.

(The Court) He gets on the stand and testifies that he is not an engineer, he is not an appraiser.

(Mr. Bernstein) I am not talking about cost at all.

(The Court) No.

(Mr. Bernstein) I am going to show through him he has inspected a number of remodeled buildings and this happens to be done by the same people.

He will testify that the finished job, the offices are far above average.

(Mr. Liotta) If they are bringing in the Star Building—excuse me.

(Mr. Bernstein) Let me finish.

He inspected the Evening Star Building for the same purpose that he did this. The reason he did it (569) was to see what these people could do with the building and that was part of their judgment of valuation, as to whether this was a good or bad investment.

(The Court) All right. You are objecting.

(Mr. Liotta) Yes, sir.

(The Court) The objection is going to be sustained.

(570) (In open court.)

By Mr. Bernstein:

Q. At the time you were here in May, 1962, did you have occasion to look at the subject property? A. Yes, I inspected the property at the same time.

Q. Were you in anybody else's company on that occasion? A. Well, Mr. Alfred Bell and Mr. Dicker.

Q. Who is Alfred Bell? A. He is the broker that brought this property to us.

Q. When you say 'this property.' A. Well, the Evening Star, and later submitted this 920 Building for our consideration.

Q. 920 E Street, Northwest. A. Yes.

Q. He is a broker located in Washington, D.C.? A. Yes, sir.

Q. Now, you say you inspected 920 E Street, yourself on that occasion? A. I did.

Q. Was anyone with you besides Mr. Bell? A. And Mr. Dicker?

Q. Mr. Albert Dicker? (571) A. Yes.

Q. Now, to your knowledge did anyone else from your company inspect the 920 E Street property? A. Yes, after the formal submission was made to us, Mr. John Futcher, our vice president in charge of investments and Investment Manager, and Mr. Phil Weaver, our mortgage loan manager, made a special trip here to inspect the property.

Q. Again, that is 920 E Street? A. That is right.

Q. Now, did there come a time when an actual formal submission was made to you? I believe you mentioned the date before. A. Yes, sir.

That was October 10, 1962.

Q. And in substance what was that submission—what was the request for? And by whom was it made? A. Well, it was made by David Lawrence, Albert Dicker, and David H. Fromkin.

Q. And can you summarize in substance what the request was for? A. It offered this building to us for a price of \$2 million 8 hundred thousand.

Q. Under what kind of an arrangement? (572) A. Subject to our leasing that back to these three gentlemen for a twenty-five year period at a rental of 7.74 per cent of the cost to be paid annually, with three renewal options of 21 years each at the same rental figure.

Q. Now, is this what is commonly known in your profession as a sale-back lease proposal? A. It is.

Q. Now, can you describe for the enlightenment of the Court and the jury and counsel, what a sale back lease arrangement is and how it compares with a conventional mortgage situation.

(Mr. Liotta) I object. Counsel has submitted this document as evidence of a sale. Now, he is talking about mortgage.

(The Court) Doesn't it speak for itself, Mr. Bernstein?

(Mr. Bernstein) Your Honor, it might well be that most people know what a mortgage is. I pose to the Court whether people are generally familiar with a sale-lease back.

This is purely informational.

(The Court) You contend this was a sale?

(573) (Mr. Bernstein) This was a sale-lease back, not a sale.

I would like the witness to explain to the jurors what a sale-lease back is. So they can compare it.

(The Court) All right.

(The Witness) A sale-lease back is where an investor will

buy a piece of property, lease it back to the seller for a stated period of time and at a stated rental.

By Mr. Bernstein:

Q. Is your company also engaged in lending money on real estate on the strength of first mortgages?

(Mr. Liotta) Objection. Irrelevant.

(The Court) Yes. The objection is sustained.

By Mr. Bernstein:

Q. Now, in connection with the consideration of this proposal to which you have referred, who, in your company, participated in analyzing this proposal? A. Well, the same—

(Mr. Liotta) Objection. The instrument speaks for itself and it has been offered as I understand it. Who participated in the subsequent or prior agreement does not come into this.

(Mr. Bernstein) If the Court please, counsel for the Government has previously specifically asked witnesses questions "Didn't you know for example that such-and-such an appraisal was made by so-and-so?"

I submit he was doing it to try to—

(Mr. Liotta) Excuse me.

Are you going to make a speech?

(Mr. Bernstein) I have not finished with my statement.

(The Court) Wait just a moment.

The objection is overruled and the witness may answer the question.

(The Witness) What was the question again, please?

(Mr. Bernstein) Would the reporter please read it to the witness.

(Question read.)

(The Witness) Mr. Fletcher assisted, our vice president

and investment manager, myself, Mr. Phil Weaver and our assistant general attorney.

By Mr. Bernstein:

Q. What considerations or papers or documents or other subject matter were considered by the gentlemen that you have mentioned in weighing this proposal? A. Well, we had a photocopy of the GSA lease that was viewed by our assistant general attorney. We have the (575) preliminary blue prints for the remodeling of this building, and, of course, we knew what the rent would be and we were supplied with the cost of taxes and cleaning and so forth—the maintenance of the building.

By Mr. Bernstein:

Q. Did you, by any chance, see any type of rendering of the building? A. Yes. We had a large rendering of this building, the same as this original larger (indicating)—that we considered and took to our investment committee for our viewing.

(Mr. Bernstein) May I have this marked as Owner's Exhibit No. 4.

(Deputy Clerk) Owners Exhibit No. 4.

(Defendant's Exhibit 4 marked for identification.)

(The Court) Will you come up here?

(576) (At the bench.)

(The Court) Is it an architectural—

(Mr. Liotta) It is a picture.

(Mr. Yochelson) Our proposed rendering of the building when completed.

(The Court) Now, should that go in evidence?

(Mr. Bernstein) I submit it would.

(The Court) Why?

It was never built.

(Mr. Bernstein) It does not matter whether it was built.

(The Court) Now, the blue prints are entirely different and that kind of thing—isn't this introduced—because all of this testimony is for the highest and best use.

(Mr. Bernstein) That is right. This is the building against which was contemplated to be built to serve a specific purpose and a specific lease ran against it which they considered—

(The Court) My understanding is that these walls were to remain as they were.

(Mr. Bernstein) That does not mean that they would not break windows here—could put a covering (577) through.

(The Court) Aren't you going to have—

(Mr. Bernstein) We are going to have the blue prints, too.

(The Court) Aren't you going to have the builder in here?

(Mr. Bernstein) The builder, too. But the architect is the one who characterizes the looks of the building and this is the rendering of what he drew prints to complete.

This is the document or one of the documents on the strength of which these people actually did what they did. I will not repeat that.

(The Court) That is my point. They certainly would not do it on a picture.

(Mr. Bernstein) Not a picture alone. We propose to introduce the blue prints.

(The Court) I am not so sure that he would not have done it. That Mr. Hendrickson might not have put out \$2 million 8 on a picture.

(Mr. Bernstein) Your Honor, he did no different than any mortgage company. They rely upon the builder who are reputable people. As a matter of fact, most mortgage companies in this—including banks—do it purely on paper, "X" dollars (578) for the building within the limits.

(The Court) All right.

(579 (In open court.)

By Mr. Bernstein:

Q. Will you continue as to some of the other material that your group of people that you mentioned took into consideration in your evaluation, Mr. Hendrickson? A. You mean as to the amount of rent and so forth?

Q. Yes, sir. All the factors that you considered. A. Well, the lease that we had from the General Services Administration showed that they would pay a rental of \$388,992.92 for five years. After that period it would be \$417,000 a year.

We considered this plan \$399,000 rent the least rental that the lessee—that was the sellers—to use and we leased it back to them—this required payment on a sales price of \$2 million 800 would be \$216,720, and then considering the expenses of \$165,000, would leave in excess of \$66,000 in excess of what would have to be paid to us.

In other words, the lessees would have this in excess of the payments, or the required payments.

Should I tell how we arrived at the valuation?

Q. I will come to that. A. All right.

Q. Incidentally, Mr. Hendrickson, prior to your (580) coming to inspect this property for the purposes that eventuated which you have partly testified to already, did you know any of these owners by name, sight or in person? A. I did not.

Q. Did you by chance ever see me before you arrived late yesterday? A. No, sir.

Q. Or Mr. Yochelson with whom I am associated? A. No, sir.

Q. In the consideration of this proposal by the Woodmen of the World, were there any unusual circumstances different from any other financial transactions that would be

presented to it that bore one way or the other on your action? A. No other difference. The only difference was that it was going to be leased to a government agency. That was something that we had not done before. Of course, that is a plus factor.

Q. So that except for that one plus factor, your approach to whether or not to make this investment was no different than to make the other \$250 million that you have outstanding, is that correct? (581) A. No. But we do not have \$250,000 or \$250,000,000 invested in real estate but we have a proportion of it.

(Mr. Liotta) Now, is that no, it was, or no it was not? I did not understand that.

(The Witness) Well, as I explained later, it was no different than any other proposition. Only I clarified it with this statement that we do not have \$250 million invested in real estate or our properties.

By Mr. Bernstein:

Q. At the time you entertained this proposal—wait just a moment. Did you want something?

(The Court) Wait, did you want something, Mr. Hendrickson?

(The Witness) No.

By Mr. Bernstein:

Q. At the time you and your company entertained this proposal, Mr. Hendrickson, did you have any knowledge whatsoever or did the company have any knowledge whatsoever that anything would happen to this property other than the building of this office building? A. We had no idea.

Q. Did you have any wind—if I can speak a word like that—of any future condemnation possible? A. No, sir.

(582) Q. Incidentally, you spoke of a rendering you received which was several times larger than the one I showed

you of the size of the building; what did you do with that rendering?

(Mr. Liotta) Objection.

(The Court) The witness can answer.

(The Witness) Well, after we had notice that the property was going to be condemned, we kept it for several months and then destroyed it because we did not—we were not going to be buying the property.

By Mr. Bernstein:

Q. When you got the rendering, when you first received it, what did you do? A. We took it to our investment committee and showed it to them for their consideration to get their idea of what the property would be like after it was remodeled.

Q. Then what did you do with it? A. We kept it in our office for quite a while. We had it up on the wall because it was a beautiful building.

Q. Now, you said you had gotten this proposal from the gentlemen who owned the property and you have already testified that a group of four went over to analyze it. After that analysis, what occurred next within the (583) company? A. We submitted it to our investment committee.

Q. And what action if any did that investment committee take? A. They agreed to make a commitment to purchase the property and lease it back to these three people that submitted it to us.

Q. In accordance with that decision did the company issue any form of document? A. We issued a commitment letter, then, dated—

Q. May I see it. A. —dated November 8, 1962.

Q. Is this that document? A. It is.

Q. And this comes from the original files of the company?
A. Yes.

Q. This document is in the form of a letter? A. I have the actual original copy here. Just a moment.

Q. Take your time and look, Mr. Hendrickson. A. Here is the original commitment letter.

Q. All right.

(Mr. Bernstein) With the Court's permission, instead (584) of the original, which belongs to the file of the company, I would like to offer in evidence as defendant's exhibit 3 a photostatic copy of that document, or have it marked for identification.

(Mr. Liotta) Subject to my objection to this testimony I have no objection to his substituting a copy. I think counsel's representation is a true copy.

(The Court) Are you offering it at this time?

(Mr. Bernstein) I am just having it marked now and I will offer it at a subsequent point.

(The Court) There is no objection to having a copy and leaving the original with Mr. Hendrickson.

(The document was marked Defendant exhibit 3 for identification.)

By Mr. Bernstein:

Q. Mr. Hendrickson, I observe on the fourth page of that commitment a signature in the middle of the page. How does that signature read, first? Would you read it? A. John F. Futcher, vice president and investment manager.

Q. Do you know whose signature that actually is? (585)
A. I do.

Q. Whose? A. John F. Futcher's signature.

Q. How long have you been connected with Mr. Futcher, businesswise or socially? A. Approximately 25 years.

Q. Now, after Mr. Futcher signed this document, what happened to it? A. It was mailed to Mr. Alfred M. Bell, who was the broker that brought this property to us. It

was then accepted by David Lawrence, Albert Dicker and David Fromkin, who signed and accepted the commitment letter—the terms of it.

Q. Where did the document then go? A. The signed copy came back to us, which I have here.

Q. With anything? A. Oh, no, because the copy of the lease had been forwarded—I see what you mean. The copy of the lease had been sent to us before, the GSA lease. Then we were given a commitment, not a commitment but a good faith deposit of \$14,000 as computed on the basis of one half of one per cent of the amount we committed for.

(586) Q. I will come back to that in a moment, Mr. Hendrickson. I may have missed covering one thing: In this commitment where you agreed under certain conditions to purchase this property for a certain price and then lease it back to the former owners under certain conditions, did it cover the entire property or only the improved portions of the property? A. That only included the improved portion, about 20,000 feet.

Q. In other words, the parking lots or vacant areas were not included in this arrangement at all? A. That is right.

Q. And they would still go on to the former owners, is that correct? A. No, if I may return to this \$14,000 that you received—you called that a 'good faith' deposit? Right.

Q. That deposit would be put up by the people who were going to sell to you and lease that and it would be held by you? A. That is right.

Q. And held by you, that meant the company, against what eventualities? A. Well, in the event that the sellers backed out on the agreement, or sometimes they go to other people (587) for financing, we would retain the \$14,000 as our compensation for working on the proposal and being ready to carry out the sale or purchase of the property.

Q. Now, apart from the Woodmen of the World, itself, in the insurance financing or real estate financing industry, whether it be mortgages or lease-backs, is this good faith

deposit an isolated instance or practice with you or others, or what is it? A. It is general practice.

Q. What is the basic purpose that it serves? A. Well, we found out over the years that we have made commitments and not required a good faith deposit—sometimes if it is on a construction job or remodeling job—which this was, when it is completed the seller in this particular case might go to someone else and maybe get more favorable terms, interest rates, and so forth. This commitment letter, which is a contract in this case would have been the sellers of the property, could take that to a bank or lending agency and get inter-financing. It is of a value.

Q. I am not sure I understand precisely what you mean there. Let me see. They get the commitment letter which you say is a binding agreement. You say they can (588) then go to the bank and get money—for what purpose? A. For the cost of remodeling while the construction is in process.

Q. Has it been your experience with commitment letters like this that, in fact, the people to whom the commitments are issued do, in fact, go to the bank and get inter-construction money?

(Mr. Liotta) Objection.

(The Court) Aren't we getting far afield?

(Mr. Bernstein) I submit it is relevant.

(The Court) Then we will have to go into his cases that he knows of and what he did and what the conditions were.

Do you know?

(The Witness) Sir?

(The Court) Do you know? Can you tell the jury where you have had a commitment letter, what the people did with it—what kind of terms they got and why they did not take your—

(The Witness) I can tell of a recent one.

(The Court) Are we going to try each one?

(Mr. Bernstein) It is necessary. Counsel has asked about usual practices. This is on appraisal.

(589) (The Court) I do not see why we go far afield.

(Mr. Bernstein) I will withdraw it.

(The Court) All right.

(Mr. Bernstein) I offer defendant's exhibit 3 for identification.

(Mr. Liotta) Objection.

(The Court) The objection will be overruled.

(Mr. Bernstein) I am looking for the copy that is so marked, Your Honor. Here it is. Let me take that for a moment and I will give you another copy.

Your Honor, may I have your permission to read this to the jury?

(The Court) Yes, it is in evidence. You may read it.

(Mr. Bernstein) This is on the stationery—

“The Family Fraternity”

“Woodmen of the World Life Insurance Society

1708 Farnam Street,

Omaha 2, Nebraska.”

On the lefthand side, “Office of the Investment Committee.”

It is addressed to:

“Mr. Alfred M. Bell,

(590) “Alfred M. Bell & Associates,

“401 Third Street, Northwest,

“Washington 1, D.C.”

(Mr. Liotta) I am sorry to interrupt you.

Your Honor, I have no objection to counsel reading it. Your Honor has ruled and I respect your ruling. But to save time, the jury can read that. This thing is four pages long, sir. I would request that he just hand it to the jury.

(Mr. Bernstein) I am satisfied, Your Honor, in order to expedite things, we have extra photostatic copies. May we have them available for the jury for their convenience?

(The Court) Yes.

(Mr. Liotta) I have no objection to that, subject to my objection to the whole thing.

(Mr. Bernstein) I am satisfied with that.

(The Court) All right.

By Mr. Bernstein:

Q. Incidentally, you spoke about the fact this proposal was submitted to your committee on the recommendation of the four men who worked down there. Did that investment committee have any sort of minutes or report on their action? (591) A. Yes. We have the minutes, dated November 7, 1962, made up of our president, executive vice president, secretary and treasurer. They approved the purchase and the lease-back of the property.

Q. Could I see both the original of those minutes and a photostatic copy, please? A. Here is the original and here is a photostatic copy.

(Mr. Bernstein) In line with the last exhibit, may I have the photostatic copy marked for identification?

(The Court) It will be so identified.

(Deputy Clerk) Defendant exhibit 5.

(Defendant's exhibit 5 marked for identification.)

(Mr. Liotta) Subject to my objection on it, totally, Your Honor; as I explained before, there are certain matters in there that do not refer to this property.

(Mr. Bernstein) May we cut that portion out?

(The Court) Yes.

(Mr. Bernstein) I agree with counsel.

(Mr. Bernstein) I offer in evidence the photostatic copy of these minutes subject to the qualification that we have agreed upon with counsel for the government, that we will eliminate those things that do not refer (592) to this particular transaction.

(The Court) That is right.

(Mr. Bernstein) I agree with counsel.

(Mr. Bernstein) I offer in evidence the photostatic copy of these minutes subject to the qualification that we have agreed upon with counsel for the government, that we will eliminate those things that do not refer (592) to this particular transaction.

(The Court) That is right.

There is nothing being withheld from the jury aside from the fact that the minutes reflect other business.

(Mr. Bernstein) They deal with a transaction that has no relation and it is personal to that company.

(Mr. Liotta) May my objection be noted?

(The Court) Yes.

(Mr. Bernstein) When the jurors get the documents, could we give several copies of this—

(The Court) Then you will leave out the other, is that correct?

(Mr. Liotta) Yes, sir.

I do not want to mislead counsel. I will refer to a few specific paragraphs in that commitment and I am going to have them read.

(The Court) That has been introduced into evidence.

(Mr. Liotta) Yes. I do not want to mislead counsel at all.

(The Court) Yes, counsel understands that, and will have that before the jury.

(593) (Mr. Bernstein) Would Your Honor indulge us a moment, please?

(Pause)

You may examine.

CROSS EXAMINATION

By Mr. Liotta:

Q. Mr. Hendrickson, am I pronouncing your name correctly? A. Yes, sir.

Q. You made a statement that you were going to purchase this property for \$2 million 8. Is that what you said? A. Well, the commitment letter is \$2 million 8 hundred thousand, or the appraised value, whichever is the lesser.

Q. On your direct examination you did not say—"or the appraised value, whichever is the lesser," did you? A. Probably did not.

Q. All right. Then that could mean, could it not, that there is a possibility you would pay less than two million eight hundred thousand; isn't that right? A. It could be.

Q. Let us couple it with two paragraphs of your (594) commitments.

Am I right in stating, or would you read paragraph one of the commitment? A. "Consideration has been given to the proposal of Messrs. David Lawrence, Albert P. Dicker and David Fromkin submitted by you for the sale and lease-back of the property referred to in the caption above."

That is the property we are talking about.

Q. Would you go to paragraph 1? A. Oh, numbered 1.

"1. The Society agrees to pay a sum not to exceed \$2,800,000, or the appraised value of the property, whichever is the lesser."

Q. Now, would you go to paragraph 3? A. Yes.

"3. The Lessee shall furnish at its expense to the Society upon completion of the renovation a complete appraisal of the property by an appraiser approved by the Society who is a member of the American Institute of Appraisers. Mr. Charles C. Koonen, M.A.I., C.R.E. is acceptable."

(595) Q. Now, going to the minutes that you have in front of you. A. Yes, sir.

Q. Read the first paragraph of the minutes of the meeting of the investment committee after the list of names, that means after P. A. Weaver, the first paragraph beginning, "Mr. Fatcher." A. (Reading)

"Mr. Fatcher presented to the Committee a proposal received through Alfred M. Bell and Associates, Washington, D.C., to purchase for the sum of \$2,800,000, or the appraised value—whichever is the lesser—real estate located at 920 E Street Northwest, Washington, D.C., comprising two tracts of land, with a total area of approximately 20,000 square feet. There are presently located on the tract two warehouse buildings, one of eight stories with a basement and one, an annex of six stories, which are to be completely renovated at an estimated cost of \$1,800,000, to be leased to the General Services Administration for the benefit of the Labor Department of the United States Government at an annual gross rental of \$389,000."

Q. Now, sir, taking your maximum figure according (596) to your commitment of \$2,800,000, deducting your \$1,800,000 of estimated cost to improve, and what does that leave? A. \$1 million.

Q. Now, sir, it is very possible that this property would have appraised or could have appraised for somewhat less than \$2,800,000, is that not so?

(Mr. Bernstein) If the Court please, I want to be certain of the question. Are you saying it is very possible or possible?

By Mr. Liotta:

Q. I will take your suggestion. It is possible. A. It is.

Q. It could have appraised more than two million? A. It could.

Q. It could have appraised more than one million-five? A. It is not possible but it could.

Q. It is possible. A. It is possible.

Q. That was not up to you to judge. That would have been up to some appraiser that was hired, or Mr. Koonen? A. Right.

Q. You are not an appraiser? A. I am not a licensed appraiser, no.

(597) Q. You are not an engineer? A. No.

Q. What is your background—accounting, or what? A. I have been in the investment department approximately thirty years. I have been handling this type of business and we went into it in 1945. I have traveled all over the United States and made our own appraisals. We have yardsticks that we use for our own appraisals. This building had 130,000 square feet in it and a low-cost of construction for office space is about \$20 a foot, which, in our calculation, would make the building worth about \$2,600,000 exclusive of land. That was the basis on which we calculated this particular deal.

Q. Are you all through with your explanation? A. Yes, sir.

Q. Let me ask you something: Were you buying this building or were you buying earnings? A. We were buying the building but we considered the earnings.

Q. This building was in the Mojave Desert, say, and was going to be rented to the United States for \$388,000 a year for five years with a lease-back where you (598) could depend on Dicker, Lawrence and Fromkin to carry on; would you be satisfied to lend the money that you are talking about?

(Mr. Bernstein) Counsel for the government was opposed to referring to other buildings. It is more remote to consider one in the Mojave Desert. I object.

(The Court) Overruled. The witness may answer. The Court feels the witness has already answered the question.

(The Witness) We would not.

By Mr. Liotta:

Q. You were buying this building and not earnings; is that right? A. Yes. Subject to this lease which had earnings, of course.

Q. Subject to Uncle Sam, an inner lease? A. Yes.

Q. If there was no government lease, there was no commitment? A. Right.

Q. According to your testimony, the reason you required a deposit, is because some people do not take you up on your mortgage lending, is that right? A. That is right.

Q. If it is a binding agreement, how can they (599) walk away from it after you have gone ahead and committed? A. They do it.

Q. They do it? A. Certainly. We could sue for damages, probably, but we are not in that business.

Q. A half of one per cent of the purchase price you demanded, or \$14,000. That was a half of one per cent? How did you arrive at that? A. It is a fee that we usually charge. One per cent, half a per cent, and so forth. It is customary.

Q. In this case, was it a half of one per cent of what? A. Of the estimated purchase price, of \$2 million eight.

Q. Does that give you \$14,000? A. I believe it does.

Q. Does it? Do you read the newspapers in the District of Columbia when you come down here? A. Yes, sir.

Q. You made a statement that there was no wind, I believe you said, as to any possible condemnation in this

case? A. Not at the time we made a commitment or we would not have made the commitment.

(600) Q. Well, when did you first come down to the City of Washington? A. I was here, I am sure it was the month of May, 1962.

Q. Let me ask you another question. You said this did not include any vacant lots. Did it include lot 50 back here?

.

(601) Q. Did you orient yourself, sir? A. You asked if we were buying Lot 50?

Q. Yes. A. From the map submitted to us, there are no lot numbers. The only ground that we were buying was under the building.

Q. Your commitment did not include the property underneath or the Lot 50 as designated on here? A. This is Lot 50?

Q. Yes. A. No.

Q. You are positive of that? A. Yes.

(Mr. Liotta) May I have Your Honor's indulgence for a moment?

(The Court) Certainly.

By Mr. Liotta:

Q. Mr. Hendrickson, would you read paragraph 5 a) and b) out of the commitment for us? Do you have that in front of you? A. Yes. 5 a)?

(602) Q. Yes, and 5 b). A. (Reading)

"5 a) Term—The lease shall provide for a primary term of 25 years from the date of conveyance of title and shall grant to the Lessee the privilege of electing three 21-year renewal terms."

(Mr. Yochelson) Excuse me. I think perhaps it might be clearer if he read all of 5 so he would know what is being spoken of in the lease.

(The Court) All of 5?

(Mr. Yochelson) Yes.

(The Witness) (Reading)

"5. The Society as lessor and the Lessee shall execute in duplicate a lease which shall contain, among other provisions, the following:

"a) Term—The lease shall provide for a primary term of 25 years from the date of conveyance of title and shall grant to the Lessee the privilege of electing three 21-year renewal terms.

(603) "b) The lease shall provide for the payment of the net annual rent by the Lessee to the Society during the primary term of 25 years and also during each year of each renewal term an amount equal to 7.74 per cent constant per annum, computed upon the basis of the actual purchase price paid by the Society. Said rent shall be paid in equal monthly installments in advance."

By Mr. Liotta:

Q. 7.4 per cent went into the actual purchase price when and if determined.

So, taking the maximum that you could have paid for the property, 7.74 of \$2,800,000, your computation is \$216,000 per annum? A. \$216,720.

(Mr. Bernstein) May we have your indulgence just one moment?

(The Court) Certainly.

(Pause.)

By Mr. Liotta:

Q. Now, the government lease was for five years, right?
(604) A. Right.

Q. And there was no \$417,000 per annum for five years thereafter? A. \$417,000 per annum, year by year.

Q. If the government elected to renew? A. Right.

Q. Also in your commitment you again refer to 25 years when you get a lease-back from—to Dicker and Lawrence for the same 25 years, do you not? A. Our prime lease, that is the first lease, was for 25 years.

Q. So that after the first five years, in essence, in the event the government did not renew, after the first five years, you had to depend on Mr. Dicker, Mr. Lawrence and Mr. Fromkin to pay your money, did you not? A. We did not anticipate that would be necessary. We were quite sure the government, considering the location, would maintain the property for their use.

Q. You hoped? A. We anticipated it.

Q. And if the property sold for \$2 million, instead of \$2 million 8, you would take 7.74 of two million, would you not? (605) A. Right.

Q. I believe you stated before just what 7.74 indicated by way of interest return you expected, and the economic life of the building, the time in which you intended to recapture your \$2 million 800 thousand if that was the figure. A. I did not say the economic life.

Now, I said the prime term was 25 years. It would net our Society 6 per cent and complete amortization in 25 years.

Q. Did you or did you not say that in the opinion of your company, the economic life of this building in so far as recapture period was concerned was 25 years? A. No.

Q. You did not? A. No, sir.

Q. However, you were providing that you got your money back in 25 years? A. That is, by Nebraska statutes, the basis on which we have to purchase and leaseback the property, that you have to recapture your money, plus your interest, within the prime term of the lease.

(606) Q. You could have made the lease fifty years, could you not? A. No.

Q. Under the statute you were precluded again? A. Yes.

Q. But, as a matter of fact, you called for a return of investment within 25 years? A. That is the basis on which it was presented to us, and we accepted it.

Q. Now, if this property appraised for \$2 million, and you deducted your one million-eight, what would you have left? A. You would have \$200,000.

Q. So then, in a sense, aren't you saying that cost is not necessarily synonymous with market value, is not that what you are saying? A. No.

Q. Isn't that the edge which you keep to yourself, that, if the property does not appraise, regardless of the amount that is put into it, that you pay only the appraised price? A. We are required to only pay the appraised value.

(607) Q. I am not asking you what you are required to do, sir. We know that you are required under this commitment—

My question was: Isn't that the reason for this, or appraised value in that commitment, that cost is not necessarily synonymous with market value?

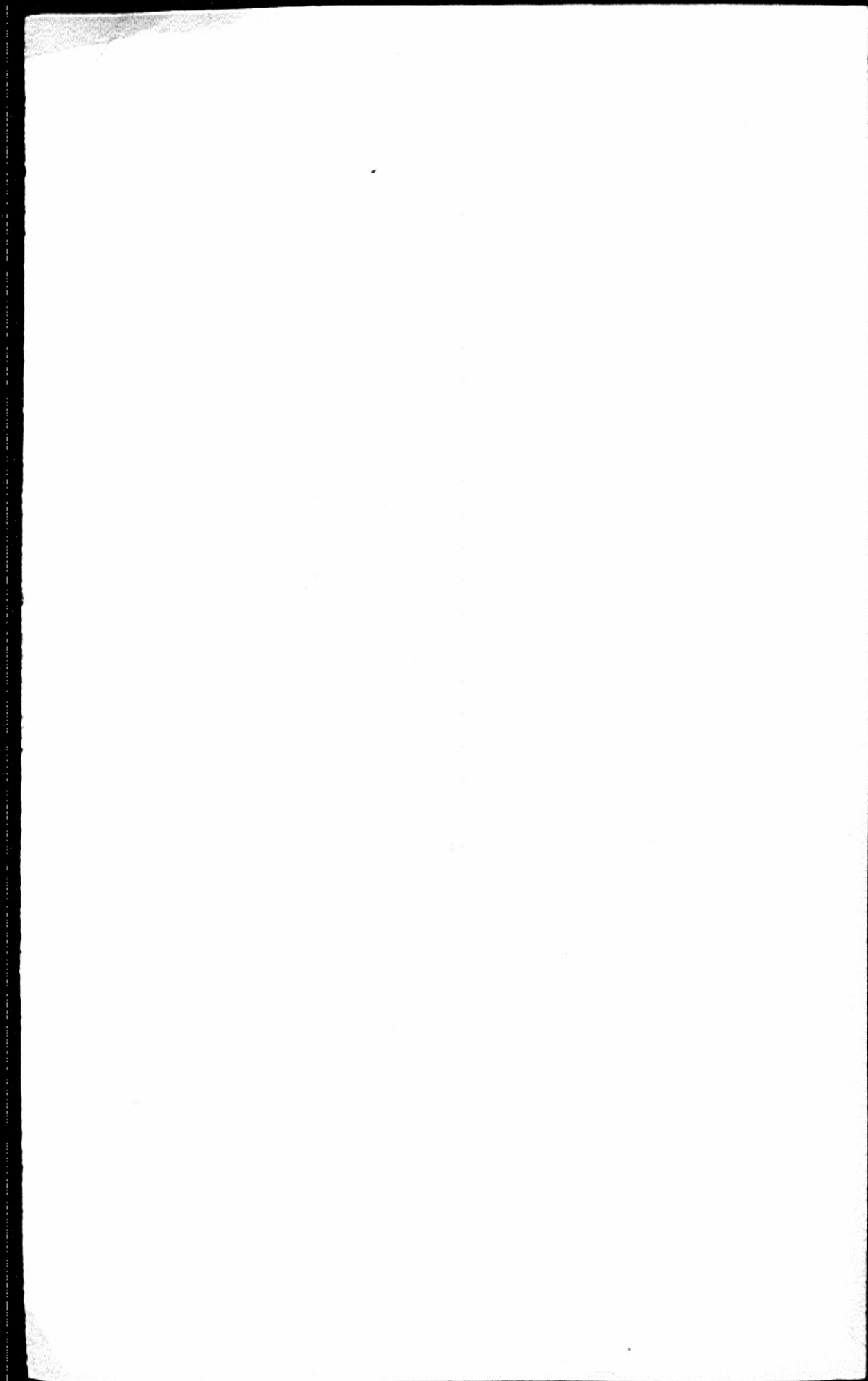
Let me ask you this: If cost was synonymous with market value in so far as your company was concerned, then under that theory, wouldn't your company then, upon proof of what the cost was for the purchase of the land and cost to improve, wouldn't they pay that price? A. We would pay the appraised value.

Q. No more and no less? A. No less.

Q. Is that right? A. I would not say less. But we would not pay more because we are precluded from paying more than the appraised value.

Q. You might even pay less? A. We have paid less than the appraised value on other properties.

Q. You are not indicating, Mr. Dicker, or Mr. Lawrence were going to give it to you for any less, are you? (608) A. I do not know. It would be possible after the renovation,



IN THE
**United States Court of Appeals
for the District of Columbia**

No. 18918

and

No. 19036

ALBERT P. DICKER, et al.

Appellants,

v.

UNITED STATES OF AMERICA

Appellee.

Appeals from the United States District Court
for the District of Columbia

JOINT APPENDIX

United States Court of Appeals
for the District of Columbia Circuit **VOL. II**

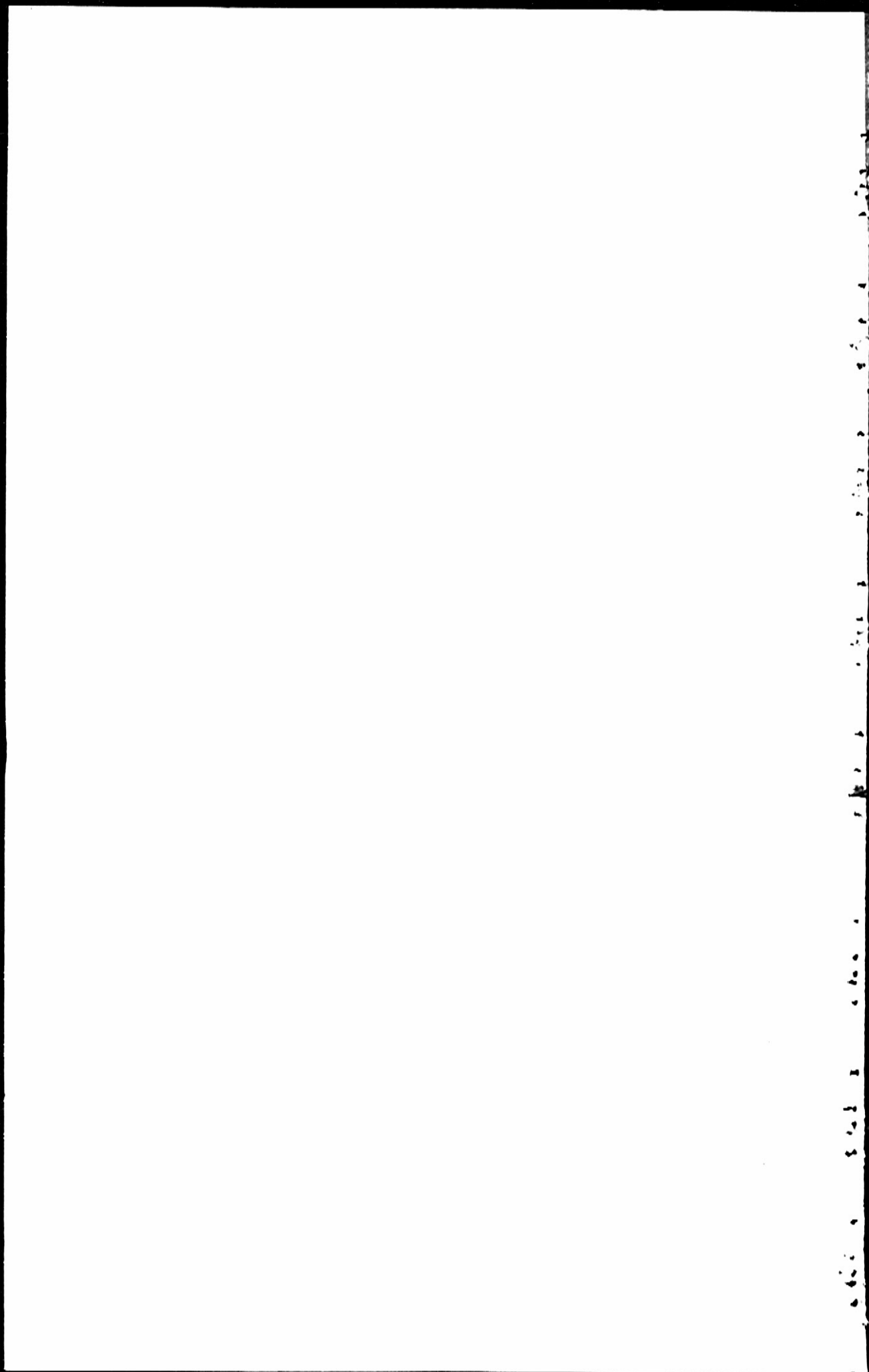
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that the cost might run more than this. It might. I should not say that—it may appraise more than two million eight. But we were going to pay two million eight.

Q. That was your commitment? A. That is right.

Q. Your total obligation was two million eight. A. That is right.

Q. And could have been anywhere from \$1.00 up to \$2 million 8, that is possible? A. It is possible.

Q. Not probable? A. That is right.

Q. Now, if someone came along and said so far as capitalization, so far as I am concerned, there are \$203,000 imputable to this building for purposes of capitalization and your estimate of 7.74 of \$2 million eight, which is the maximum, indicates that they have to pay you \$216,000 a year; would you say there was something wrong so far as the first capitalization premise was concerned? A. I do not exactly understand you. If we paid less than \$2 million eight, the amount that we paid would be computed on the basis of 7.74 per cent, which would (609) bring it below \$216,000, naturally.

Q. Let me put it this way:

That you get out of this \$388,000, if it sold for \$2 million 8, you get \$216,000. A. That is right.

Q. If it sold for \$2 million 8 and total expenses and income imputable to land left a residual amount of \$203,000 imputable to land, that would indicate that someone is \$13,000 in the hole, would it not—if you were to receive \$216,000 and it was \$203,000 that was left, someone was \$13,000 in the hole? A. I do not believe I understand you. Where does the \$203,000 come from?

Q. That comes from somewhere else. I am just asking you that.

Your figure of \$2 million eight, at 7.74 per cent is \$216,000 per annum payable to you? A. Yes.

Q. Now, when you made the statement that \$66,000 was left over, \$66,000 left over to the owners, is that what you are talking about? A. Yes. Not to the owners but to the lessees.

Q. Depending on quite a few possibilities.

(610) For instance, whether the expenses are going to be as you thought they would be? A. That is right.

Q. Were the taxes to be like you thought they would be? A. Like they were represented to us to be.

Q. Whether the expenses did not increase over a period of years? A. Well, we thought the \$66,000 would take care of any cushion or increase in expenses.

Q. Well, it could be that during the period of your first 25 years or the economic life that you considered that the expenses would increase each year. Am I right? A. It could be. Then, of course, if you understand that, in five years, it would step up to \$417,000.

Q. If the government exercised an option. A. That is right.

Q. What if they did not? A. Then we would have to look to the three lessees for the rent on the building.

Q. 7.74 per cent of whatever it was appraised for? A. That is right.

Q. Let me ask you: Why, in the initial stage, if (611) for 20 years you were satisfied to have Messrs. Dicker and Lawrence and Fromkin pay you this rent, if you were satisfied that they are Class I surety, why did you insist in your commitment that you have the United States lease before you exercised this commitment. A. Well, it was proposed to us that the United States Government would lease the buildings, and so we insisted that we have that lease assigned to us for additional protection.

Q. I refer you, sir, to paragraph six of your commitment. A. Paragraph 6.

Q. Yes. A. (Reading)

"The Lessee shall have entered into a lease with the General Services Administration for a term of five years or more which is at the date of purchase in force and effect. Said lease shall provide for an annual rent of not less than \$388,999.92 payable in monthly installments of \$32,416.66 with options to renew from year to year at a rent of \$417,000 annually, payable in equal monthly installments."

(612) Q. So, in effect, this commitment stated, did it not, no government lease, no commitment? A. That is right.

Q. So now, let us get to the next twenty years, and the two or three 25 years that you were talking about.

Let us start with the first twenty years after the United States leased. Do you in your opinion think that the income and expenses—withdraw that.

The expenses will remain constant? I am talking about expenses now. Do you think the expenses would remain constant from the 5th, to the 25th year? A. No, I anticipate they would rise just as all expenses are rising today.

Q. And during this second twenty year period, you will rely on Mr. Dicker, Mr. Lawrence and Mr. Fromkin, is that right? A. We anticipate if the government did not have it, it would go into private industry and the annual per-foot rental would be much higher than if the government rented.

Q. The government usually does not pay fair rent, would you say? A. I did not say that. I say they pay a certain rent.

(613) Usually you can get more rent from private industry. That is what I am told.

Q. So you have made all of this investment—now let me ask you this: To whom were you going to rent this building in the event the United States Government moved out in the 5th year? Do you have any idea? A. No.

Q. So you were leaving a lot to conjecture, were you not? A. That is right. Considering the location, it would appear

to anyone I believe, that you would not have too much difficulty in renting a building of this type to other tenants.

Q. Other tenants? Multiple tenants? A. It could be multiple. It could be someone larger.

(Mr. Liotta) May I have your indulgence for a moment?

(The Court) Certainly.

By Mr. Liotta:

Q. In making a commitment to purchase improved property, for leaseback to a tenant such as United States or a triple-tenant and maybe not the United States—would you give any consideration to a recapture of your (614) capital in say, fifty years? A. No. By statute, we are limited, I think, to forty years.

Q. You could have gone to forty years if you wanted to, is that right? A. I believe it could.

Q. In this case you chose to stick to 25 years, is that right? A. As I said before, this was a proposal submitted to us and we accepted it as it was submitted.

Ordinarily, we stick with 25 years for the prime term. That is our own ruling on that.

Q. You were in error when you said the maximum under statute was 25 years, is that right? A. I did not say that.

Q. Then maybe I misunderstood you.

You can go to forty years, then.

(The Court) Is that right, Mr. Hendrickson?

(The Witness) Yes.

(The Court) Is that by statute?

(The Witness) Yes.

• • • • •

JAMES W. RANKIN

DIRECT EXAMINATION

(619) By Mr. Bernstein:

Q. State your name. A. James W. Rankin.

Q. Where do you reside? A. 5025 36th Avenue, Hyattsville, Maryland.

Q. Your employment, sir? A. By the General Services Administration.

Q. Of the United States of America? A. Yes.

Q. And in what capacity are you so employed, sir? A. I am employed as Chief, Midwestern Branch, Lease and Acquisition, Office of Space Management.

Q. Now, you say Chief, Midwestern Branch of the Lease Acquisition. A. Lease Acquisition, yes, sir.

Q. How long have you been in the Midwest Branch? A. I have been there since October of 1963.

Q. Prior to that time where were you located? (620) A. I was located in the General Services Administration, Region 3 office, in Washington, D.C.

Q. Now, Region 3 embraces the City of Washington, itself? A. The District of Columbia, States of Maryland, Virginia and West Virginia.

Q. And you were concerned there with the acquisition of properties by lease or purchase? A. Yes, sir.

Q. Were you chief of the branch at that time? A. I was chief of the Acquisition branch, yes, sir.

Q. In that capacity, sir, did you become concerned with the leasing of a certain property that sometimes is known as the Merchants Transfer Property, and other times known as 920 E Street, Northwest? A. Yes, sir.

Q. Now, prior to entering into any arrangement with respect to that property, did the government issue a so-called "Invitation for the Leasing of Space?"

(Mr. Liotta) Objection.

(The Court) Overruled.

(The Witness) Yes, the government did issue an Invitation for Bid.

(621) By Mr. Bernstein:

Q. How many feet was that an invitation for? A. The Invitation listed offers for upwards of 600 net usable per square foot.

Q. For rent or for purchase? A. For rent.

Q. Did the government receive any responses or bids, so-called, in response to that invitation?

(Mr. Liotta) Objection, Your Honor.

(The Court) Overruled.

(The Witness) Yes, the government did receive offers as a result of the invitation.

By Mr. Bernstein:

Q. How many offered sites were offered in response to that invitation, or approximately? A. Sixty-three.

Q. Sixty-three? A. The total number of offers submitted were more than sixty. My best recollection is it was about sixty-three.

Q. Do you by chance have any kind of a condensed lease—I am trying to save time, or a map or anything that would show where those 63 offered sites were located.

(622) (Mr. Liotta) Objection.

(The Court) Overruled.

By Mr. Bernstein:

Q. Is there anything in the government records in a condensed version so we will not have to look at all of the invitations? A. It is in the records furnished here but is not in the files before me.

(Mr. Bernstein) Pardon me.

Mr. Liotta has been kind enough to give me some.

By Mr. Bernstein:

Q. Mr. Liotta has given me a photostatic copy of a document here consisting of 13 pages. Can you say whether that is a composite of all of the responses to the Invitation to Bid? A. This is the list of the bids received.

Q. Can you tell approximately when this composite was made up? Is there anything on here to tell you? A. The verification date of the tabulation is April 3, 1962.

Q. Thank you, sir.

(Mr. Bernstein) Just a moment.

(623) (The Court) You said April 3, 1962?

(The Witness) Yes, Your Honor.

(Mr. Bernstein) I would like this document marked for identification as Defendant's Exhibit 6, is that correct?

(The Clerk) Yes.

(Mr. Liotta) You are not offered it at this time.

(Mr. Bernstein) Not yet.

(Defendant Exhibit 6 marked for identification.)

By Mr. Bernstein:

Q. I take it, Mr. Rankin, that by reason of the responses received to the particular Invitation—and I note here that the bid opening was March 27, 1962—that as of March 27, 1962, there were at least sixty some office building sites available to the government for its use, if it wanted to lease that, is that correct?

(Mr. Liotta) Objection.

(The Court) Overruled.

(The Witness) We received proposals from sixty-three parties, offering to rent space to the government, in response to the Invitation.

(624) By Mr. Bernstein:

Q. So there were 63 site buildings or buildings to be built which were available to the government for office leasing as of March 27, 1962? A. Yes, sir. Not all of them were within the acceptable geographical boundaries.

Q. Some of them were a little too far distant? A. Yes.

Q. Too far distant from what? A. From the geographical boundaries acceptable within the Invitation.

Q. In other words, they had to be within a certain radius, so to speak? A. That is correct.

Q. Within a certain radius of what? A. Within an eight-mile radius measured from the zero milestone, Washington, D.C.

Q. Was it zero milestone? A. Yes.

Q. What is that? A. The zero milestone is a marker south of the White House at the Ellipse from which all distances from Washington are measured.

(625) Q. The closer to the White House, the better, in other words—that was the focal point? A. No, sir. A bid anywhere within the eight-mile radius would be acceptable for the purposes for which we issued the Invitation.

Q. I recognize that it would be acceptable or eligible, if I may use that word. But obviously, isn't it so that if you use a radius like that, the closer to the center or focal point, the better?

(Mr. Liotta) Objection. He should not say that.

(The Court) The witness has not said it but he can answer the question if he knows.

(The Witness) The Invitation stated "Location Space to be in the District of Columbia, nearby Maryland and Virginia, preferably in or near the central business district of

Washington, D.C., generally the space offered should be within an 8 mile radius measured from zero milestone in Washington, D.C."

Q. Would you read back that clause about "closer to the central business district preferably?" A. "In the District of Columbia, nearby Maryland and Virginia, preferably in or near the business district of Washington, D.C."

Q. Would you look at this aerial photograph (626) for a minute?

By the "Central Business District of Washington," don't we mean that which borders the Federal Triangle right to the north, with Pennsylvania Avenue being its southern border? A. I have no ready definition of Central Business District.

Q. The term was used in the Invitation. What was meant by it? A. The central business district is that area of the City where the predominant business office buildings are centrally located.

Q. Would a location between 9th and 10th on E Street be well within the central business district? A. It would be considered to be acceptable within that definition; yes.

Q. Would it be well within the acceptable distance? A. I think so, within the central business district.

Q. Incidentally, have you totaled up the number of square feet that was made available to the government on this Invitation? A. Yes, I did. At one point.

(627) Again my file does not contain that. My best recollection is that it was—

Q. Approximately? A. Five or six million square feet of space.

Q. Would it refresh your recollection if it were over six million square feet of space made available to the government in March of 1962 in response to this Invitation? A. I believe that would be approximately correct.

Q. It would be fair to say, would it not, sir, that when the government, if it did select a site of up to say 120,000 or 130,000 feet on E Street, that this was not an ugly duckling plucked from amongst a beautiful bunch of birds? This was not foisted upon them but they had plenty to pick from, is not that true? A. That is not correct. The building was not selected from that list. The building was selected by reason of, one of the primary reasons was its potential delivery date as against the dates of the other buildings that were potentially available.

Q. But there were six million other feet available, less 130,000 feet from which the government could have picked it if it had chosen; is not that correct? (628) A. No, sir. Most of the buildings were not in existence.

Q. Well, you considered this building if you did pick those as being in existence, is that correct? A. We picked the building as being deliverable in a certain length of time.

Q. You were not very concerned about it being deliverable. You were not concerned about that? A. Our concern was to have it delivered in office condition.

Q. You picked this one as being one that could be delivered to you within the condition you wanted? A. Within the time allotted, yes, sir.

Q. To assure it would be delivered at the time you wanted, you required that this bidder put up a performance bond that would assure the government that the building would be delivered as required by the lease? A. That is correct.

Q. So the bidder, if I can use that—or the owners, the owners failed to complete the job—if they failed to complete the job, the bonding company would have completed it for you; is not that true? A. I believe the bonding company either had the (629) option to complete it or to forfeit the bond.

Q. Will you look for the bond in your file, sir? A. I have it before me.

Q. May I see it a moment, Mr. Rankin?

Can we remove it from the file, Mr. Rankin, if you please?
A. Yes, sir.

(Mr. Bernstein) I observe on this, sir, that the bonding company was Peerless Insurance Company, is that correct?

(The Witness) Yes, sir.

By Mr. Bernstein:

Q. That was a bonding company acceptable to the Government of the United States, was it not? A. That is correct.

Q. In fact, this bond was accepted by the Government of the United States, was it not? A. As meeting the requirements of the Invitation, the company was on the Treasury's approved bonding list.

(Mr. Bernstein) May I have that marked?

(Defendant's Exhibit 7 marked for identification.)

(630) (Mr. Liotta) May I note my objection?

(The Court) Your objection will run, yes, sir.

By Mr. Bernstein:

Q. In the course of working out the lease in connection with this building, did you look at the building, yourself?
A. No.

Q. Other people in G.S.A. did? A. Representatives of my office.

Q. Did they report to you? A. Yes, sir.

Q. What did they report to you as to the physical condition of the structural part of the building?

(Mr. Liotta) Objection. Irregardless of Counsel's request, I respectfully submit that he is now in the area that I submit he is going to be bound by this party's testimony, and I would so like the record to reflect.

(The Court) Gentlemen of the jury, the Court will advise you or instruct you that this witness is called by the

property owner as what in law is known as an adverse witness.

In other words, the property owner is not bound by the testimony as he is with other witnesses that he (631) has called, and he also has the right to ask particular questions and not be bound by the answers.

At this time you object to the question on the basis that he should be bound.

(Mr. Liotta) Yes, sir.

(Mr. Bernstein) Would the Court indulge me one moment?

(The Court) Yes.

(Mr. Bernstein) I withdraw that question for a moment, Your Honor.

By Mr. Bernstein:

Q. In connection with working out arrangements at 620 E Street—

(The Court) That is 820, is it not?

(Mr. Bernstein) I am sorry, that is 920.

(The Court) I meant to say 920 E Street.

(Mr. Liotta) Objection.

By Mr. Bernstein:

Q. In connection with the 920 E Street, Northwest property, were preliminary plans submitted to the government in connection with the bid, itself? A. Yes, plans were attached to the bid.

Q. And the government personnel went over those preliminary plans in arriving at the determination whether or not to lease?

(632) (Mr. Liotta) Objection.

(The Court) No. The objection will be overruled.

(The Witness) The plans were reviewed, yes, sir.

By Mr. Bernstein:

Q. Coming back to the other problem, did government personnel physically inspect these premises before any lease was executed? A. Yes, sir.

Q. Did one or more government personnel inspect the premises before the lease was executed, if you know? A. I cannot state positively. I think probably more than one government representative did, yes.

Q. Did the representative of the government who inspected or physically inspected the property prior to the leasing, make a report prior thereto, to those who would have to act on the question of whether to lease?

(Mr. Liotta) Objection.

(Mr. Bernstein) I am not asking about what is in the report. Was there a report?

(The Court) Objection overruled.

(The Witness) Yes, they would normally report back, yes.

(633) By Mr. Bernstein:

Q. You are familiar are you not with provisions of law that are sometimes referred to as the Economy Act? A. Yes, I am.

Q. What is the Economy Act? A. The Economy Act is a law which limits the amount of rent which the government may pay for buildings, or parts of buildings and also limits the amount of money that can be spent to alter privately-owned property.

Q. Let us come to that Economy Act or statute in so far as it applies to property rented by the government? A. Yes.

Q. You say it limits the amount it can pay? A. That is correct.

Q. Does it limit that in terms of dollars or some sort of ratio or percentage to something? A. It limits it to 15 per cent of the value of the property per annum.

Q. You mean you can only rent it at 15 per cent of the value of the property? A. That is the maximum permitted by law is 15 per cent.

(634) Q. So that are we to understand that before the government can execute a lease to lease property, it must have a valuation made of that property? A. That is correct. If the rental is over \$2,000 per annum.

Q. So that in so far as this particular property is concerned, 920 E Street Northwest, before the government could make a lease on it, it had to have an appraisal on it? A. Yes.

Q. In fact, it did have an appraisal? A. We had an appraisal on it, that is correct.

Q. And that appraisal the government had made before it signed any lease, an appraisal was made of what the value of the renovated building would be; is that correct? A. That is correct.

Q. And, after having received such an appraisal, only then did the government enter into a lease, is that correct? A. That is correct.

Q. Was the government to which the government (635) agreed within the limit provided by that law? A. Yes, it was.

(Mr. Liotta) May my objection be noted to this line of testimony without my constantly interrupting?

(The Court) Yes.

By Mr. Bernstein:

Q. Incidentally, sir, I do not want you to tell me what is in this report at all, but can you state the name of the person or persons who made that appraisal for the government? A. Yes, I can.

Q. If you would, please. A. The person making the appraisal report was Mr. Anthony Reynolds.

Q. Do you know his address, both residence and business, sir? A. I do not know his address. He is employed at Real Estate Research, Inc.

(Mr. Liotta) I may be able to save time here. My objection runs to all of this line of testimony.

However, Mr. Rank has the records here. If he is going to ask him what the appraised value was as (636) reported by Mr. Reynolds—subject to my general objection, I have no objection.

(The Court) All right.

(Mr. Bernstein) I am not sure. I want to know if I have the appraisal and if it followed the requirements of law in that appraisal.

By Mr. Bernstein:

Q. You say that he did? A. Yes, sir.

Q. Incidentally, with respect to this bond supplied to us to assure the government that the building would be completed, was there a penalty in that bond?

I hand the original to you. You may refer to any documents that you require A. The bond was in the penal sum of \$389,000.

Q. In other words, if the persons who had made the bid and signed the lease with you, if they did not complete that building that is renovated in requirement, or in conformance with the government's lease, they or somebody would have to pay the government \$389,000; is (637) that correct?

I am leaving off the end figures. A. The bond. The contract also contained a provision to try and liquidate damages.

Q. Not only would someone have to pay the government \$389,000 if the building was not renovated but there was a damage clause in the lease, also.

Would you please read what that damage or penalty clause was?

(Mr. Liotta) Objection.

(The Court) The objection is overruled.

(The Witness) Excuse me. I have to find these things. I have the paragraph now.

(Mr. Bernstein) Would you read it please, sir.

(The Witness) Paragraph 18.

“Termination for default: Damages for Delays.

Time Extensions. Subparagraph (a) ‘If the lessor’”—

By Mr. Bernstein:

Q. May I interrupt because I have a feeling I might be fairly long with this. Can you summarize? A. “Agreed: The agreed liquidated damages to (638) be computed on the basis of one three hundred sixtieth of the amount of rental quoted per annum.

Q. Well, in other words, is this a fair conclusion and I will state it approximately.

Every day this builder was delayed in delivering the building they would have to pay \$1,000 or a little bit better, isn't that correct? A. That is correct.

(The Court) There are conditions, act of God and so forth.

(Mr. Bernstein) Yes.

In other words, it was through their fault, if I may say so, is that a fair summary?

(The Witness) There was a disputes and delays clause in here. The delay was—the per calendar day.

Q. Was that paragraph number 18? A. Paragraph 18.

Q. Paragraph 18 of the lease with the government. A. No, it is paragraph 180 attachment to the lease.

(Mr. Bernstein) May I have the lease?

I will look at this copy which is already in (639) evidence.

It is "Defendant's Exhibit 1." Will you point out where it is on there so that later the jury can read it if they choose to.

A. The specific paper is not attached. It is incorporated by reference.

(Mr. Bernstein) I see. I am trying to save time. Could I have it read to the jury.

(The Court) I would like to have you clarify the fact the bond is not forfeited at \$388,000 unless the owners fail to perform.

(The Witness) Yes. In which case the government had the right to terminate the contract.

(The Court) You are not trying to tell the jury that \$388,000 is automatically handed over to the government?

(Mr. Bernstein) Oh, no.

(The Court) This is a duplicate, is it not?

(The Witness) Yes, sir.

(The Court) In other words, if the person fails to perform—

(The Witness) Fails to perform the government would have the right to terminate the contract and forfeit the bond.

(640) By Mr. Bernstein:

Q. In other words, to summarize, it is fair to say, is it not, that the government was protected against the building being delayed in completion by a thousand dollar a day penalty and protected against it at all by a \$378,000—by \$388,000?

(Mr. Liotta) Objection.

(The Court) Overruled.

(The Witness) Yes.

By Mr. Bernstein:

Q. Was a lease actually executed between the owners of this property and the U. S. Government?

(Mr. Liotta) The government has admitted that.

(Mr. Bernstein) I realize that but I want to ask him something in connection with it.

By Mr. Bernstein:

Q. What was the date this lease was executed? I am showing you Defendant's Exhibit 1 already in evidence.
A. The lease was executed August 8, 1962.

Q. Now, as of that day when the government—General Services Administration executed the lease with these owners, did the GSA know that another department of the (641) government would ask for this property to be condemned or had any such intention? A. No, sir. To the best of my knowledge it was not, although I am not directly involved in planning.

Q. You were present, were you not, when Mr. Abersfeller signed the lease? A. I was not present at the moment probably. I knew he had it for signature but no decision had been made.

Q. He had only come into office a day or two before the lease was executed? A. Yes, sir.

Q. He only acted formally based upon someone else's recommendation to him in his office, is not that correct? A. Not precisely. The contract was originally in excess of the delegation of authority to the regional office, from the Central Office. When the project had been submitted to the central office for approval once approved, was sent to the regional office for execution.

Q. Well, would it be fair to say that right up to negotiating and working this thing out, that you were one of the instrumental personnel? (642) A. That is correct.

Q. Did you have any notion this property was going to be condemned? A. No, I did not.

Q. You certainly would not have executed a lease, if you had, would you?

(Mr. Liotta) Objection.

(Mr. Bernstein) Withdraw the question.

(Mr. Liotta) He cannot tell what the United States is going to do.

(Mr. Bernstein) Nor can we. I withdraw the question.

By Mr. Bernstein:

Q. Now, have you in your capacity with region No. 3, I am speaking again prior to the time you moved to the Midwest and afterwards, in your capacity with Region 3 did you have anything to do with government rental of storage space?

(Mr. Liotta) Objection. Irrelevant.

(Mr. Bernstein) I submit counsel is going into the storage space with his appraisers. He has made that relevant.

(Mr. Liotta) He is getting into government (643) rentals of warehouse?

(The Court) This is no longer an adverse witness now.

(Mr. Bernstein) I am willing to call him as my witness.

(The Court) All right. Before you go any further, will you ascertain when it was issued, the invitation to bind?

By Mr. Bernstein:

Q. Would you state when the invitation was issued in this particular connection? A. It was issued February 16th, 1962.

Q. When was the so-called Bid Opening or these responses? A. The bid opening was March 27, 1962.

Q. And the lease was executed when, in relation to that

date in this case? Within how long—three months? A. It is closer to five months.

Q. During that five months you were working out various incidental terms? A. No, sir, not in this case. This lease was not made in pursuant to the invitation.

(644) (The Court) This lease was not made—

(Mr. Liotta) That—

(The Witness) That is correct. It was not made as a result of the invitation for competitive bids.

(The Court) Did you know that?

(Mr. Bernstein) Your Honor, No. 1, I did not know it; No. 2, I believe it was, notwithstanding what this witness is saying.

By Mr. Bernstein:

Q. Didn't you pick this company out of the responses and you knew of this property, as a result of the invitation? A. Partially.

Q. How much. You said partially, how much did you know?

(The Court) Mr. Rankin, we will take a few minutes at this time.

Have you had an opportunity to review this file?

(The Witness) Yes, sir.

(The Court) These gentlemen of the jury want to know what the facts are pertaining to this.

(The Witness) Yes, sir.

(645) (The Court) So you can review the facts for a few minutes and then we will continue on.

(The Witness) Yes, sir.

(The Court) Would you gentlemen come up here?

(At the Bench.)

(Mr. Bernstein) Your Honor, we have been denied access to the file.

(Mr. Liotta) You have not been denied; I made everything available to you.

(Mr. Bernstein) You said you would not let us look at the files. You said we would have to ask the witness on the stand and if the Court ruled the document admissible, that would be something else. If I may say, I had the file from GSA. I have said that was not an acceptance of the bid. I told you that in the beginning.

(The Court) Well now, Rankin says that it was not.

(Mr. Yochelson) Here is the summary, Your Honor, of the binds, and the Dicker & Lawrence property is on it.

(The Court) All right. Now, ask him about it. What about the other prices on here? Couldn't the government have gotten this cheaper than \$388,000? Off the record.

(Discussion off the record at the bench.)

(646) (The Court) Before you begin, sir, come up here, will you?

(At the Bench.)

(The Court) I am trying to get it clear in my own mind that in the pretrial rulings we had to do with the lease. One of the conditions precedent to the introduction of the lease was that it would be introduced on the basis that there was no coercion, no compulsion on the government. The lease came up in cross examination of the first witness. There was no objection to it. It was received in evidence.

(Mr. Liotta) To show the highest and best use.

(The Court) So that it is already in evidence. Now, what is this witness doing on the stand?

(Mr. Bernstein) Showing several things. First, the highest and best use of the office building, the government has taken, a contention which is made of whole cloth, they evaluated this as a warehouse not as an office building. I

think we are entitled to show the government had six million other feet, but they did not pick a warehouse as an office building unless they wanted it.

(647) It is an admission against interest. The government cannot take a position at one point we like this for an office building and then come to court and say that is not the highest use.

I have got some more things. I will wait for an answer.

(Mr. Liotta) My objection was maintained as to this lease as far as being utilized as an indicia of value which they have done throughout this trial. I have submitted time and time again that this was not a bid, it was a negotiated lease, and that is exactly what the witness is going to get to in a moment, I submit. I might say also that counsel has gone far beyond the frame I respectfully submit of Your Honor's ruling.

(Mr. Bernstein) Let me first answer his contentions. On the face of the lease is the bid number, the invitation, I might say. It says here, paragraph No. 12, which reads, in part, "And any all requirements of invitation and bid number so-and-so-and-so are incorporated by reference and made a part of this lease."

(648) (The Court) Well, go ahead.

(Mr. Liotta) That may be so. But ask him.

(The Court) We will go ahead.

(649) By Mr. Bernstein:

Q. I have previously started to ask you a question about your experience when you were in Region 3, before you went to the Midwest.

I had asked you a question which I will ask you again because we did not get an answer at that time. Whether, during the time when you were in region 3, you had experience in renting storage space for government use.

(Mr. Liotta) Objection.

(The Court) Overruled.

(The Witness) Yes, I did.

By Mr. Bernstein:

Q. Was that experience in the year, say, prior to January 2, 1963? A. Yes, it was.

Q. Now, did the government in fact rent any storage space for storage and so on, in the downtown area? A. Well—

(Mr. Liotta) Objection. I respectfully submit that as to other government leases, government sales, we are now getting into the same category to which my objection ran before as to the need of the United States, and any possible condemnation rule.

(649-A) (The Witness) Would you repeat that?

(Mr. Bernstein) Madam Reporter, read that back, please.

(The record was read.)

By Mr. Bernstein:

Q. I want you to confine your testimony, Mr. Rankin, in all these further questions in this relation to experience prior to January 2, 1963. That is the cutoff date for our purposes.

Prior to that time, say, in the year prior had the government leased storage space downtown anywhere? Say, within the last three years to make it easier, for the last three years prior to January, 1963, had the government rented any storage space downtown.

(Mr. Liotta) Objection. Anything that goes beyond January 18, 1963 is not relevant.

(Mr. Bernstein) I said three years prior.

(Mr. Liotta) I submit the question would be what is happening on January 18, 1963, Your Honor.

(The Court) The objection will be overruled. The witness may answer if he can.

(The Witness) May I ask a clarifying question?

(Mr. Bernstein) Yes, sir.

(650) (The Witness) I do not know if you mean a record for file, storage or part of a lease for such.

(Mr. Bernstein) I am talking about a lease, which covered only storage space. Am I clear in what I am asking?

(The Witness) Any storage space in the downtown area.

By Mr. Bernstein:

Q. I am covering downtown storage which is covered by a lease or separate addendum; in other words, the document or addendum covered only storage space for the three year period terminating January 2, 1963. Let that be a cutoff date. A. I can not recall.

Q. Maybe I can help you a little bit, Mr. Rankin, because of personal familiarity about it. Did the government by separate instrument or rider, lease for storage purposes, the basement of the renovated Evening Star Building?

(The Court) To your knowledge.

By Mr. Bernstein:

Q. Prior to January, 1963. A. The government rented the basement of the Evening Star Building.

(651) Q. Prior to January, 1963? A. Yes.

Q. Approximately when? Your closest recollection, if you give the year or month or season of the year. A. I have only my memory, as I recall—the space was delivered in the late summer of 1962.

Q. That is close enough. Now, did the government rent that basement space for storage purposes? A. Partially for storage, yes.

(The Court) Partially.

(The Witness) Yes.

(The Court) Was it on invitation?

(The Witness) I do not have the records of the Evening Star case here, sir. Again only from memory I believe the Evening Star Building was made as a result of negotiation rather than the—

(The Court) The objection will be sustained.

By Mr. Bernstein:

Q. Was there other space available to the government at that time for downtown storage? A. I cannot make a specific statement on it.

Q. Did you or did you not—did GSA to your knowledge, during the year 1962 have any statistics or make any inquiries as to the going market rate for storage space in the downtown area of Washington?

(652) (Mr. Liotta) Objection.

(The Court) The witness can answer if he knows.

(The Witness) The only answer I can give you is that the regional office maintained a constant surveillance of the market, bringing the picture into focus every so often when a demand arose; as to whether there was any specific report at any time, I cannot say.

(Mr. Bernstein) I am not asking that. During the year 1962 were you by virtue of your position in GSA in connection with leasing, familiar with general market conditions in relation to storage market space and rentals?

(The Witness) Yes.

By Mr. Bernstein:

Q. During 1962 what was the prevailing market price for the rental of storage space in the City of Washington, D.C.? A. Well—

(Mr. Liotta) Objection.

(The Court) That is purely storage space.

By Mr. Bernstein:

Q. Purely storage space. A. Purely space for storage.

(653) Q. Let me modify my question by these factors:

Fireproof space for dry storage, am I clear? A. Yes.

Q. In other words, storage you could use and it would be proper for file cabinets, files and the like, government papers.

(Mr. Liotta) Excuse me.

If he is going to make a fair comparison, I think he should say an eight story building; he is just talking about storage.

(Mr. Bernstein) I will come to that. Do you understand my question so far, 1962 prevailing market rates for dry storage, fireproof construction, so that the government could store its files? Do you know what the going rates during that year were from the statistics being kept at hand by GSA?

(Mr. Liotta) Objection.

(The Court) Overruled.

(The Witness) No, I do not.

By Mr. Bernstein:

Q. I thought you said a moment ago that you were not—

(The Court) Wait. Who subpoenaed Mr. Rankin?

(654) (Mr. Liotta) Mr. Bernstein.

(The Court) Who subpoenaed Mr. Rankin?

(Mr. Bernstein) Mr. Rankin was not subpoenaed because he was out of the District of Columbia at the time—six other officials of GSA were. The president of region 3 was called yesterday and he just was excused and they said they would call him.

(The Witness) Pardon me. I was called by a subpoena. My job is in contact with the Midwestern Office. I worked in the District of Columbia. I was served with a subpoena.

(Mr. Bernstein) You were served?

(The Witness) Yes, sir.

(Mr. Liotta) I made the substitution of Mr. Rankin for Mr. Abersfeller.

(Mr. Bernstein) In any event it is a fact we had Mr. Abersfeller yesterday and that at Mr. Abersfeller's request, he was allowed to leave town and he was to supply Mr. Rankin.

(The Witness) Yes.

(The Court) Did you put down anything about the fact of storage space on any storage space?

(Mr. Bernstein) If he does not know—but if he does not know, he cannot answer.

(Mr. Liotta) They put down on the expense (655) what they wanted and I have a filing cabinet, or filing cabinets in my office containing the material and I have advised counsel.

(Mr. Bernstein) The answer is you do not know the figures as to 1962.

(The Witness) No.

By Mr. Bernstein:

Q. In other words, the minimum or maximum so to speak during that year.

(Mr. Liotta) Object.

(Mr. Bernstein) Do you understand what I mean by the order of magnitude?

(The Witness) Yes, I understand.

The price for storage space suitable for files, that I can recall that I had any interest in during that time, would be the basement of the office buildings. The rate for clean, dry, lighted space of such type would range from the best recollection I have, \$1.00 a square foot to \$1.25 a square foot, depending on the quality and the location.

By Mr. Bernstein:

Q. Incidentally, are you personally familiar with (656) the government lease negotiations on the Charles Smith property at 12th and E Northwest?

(Mr. Liotta) Objection.

(The Court) What is the relevancy?

(Mr. Bernstein) To show the duration of the lease.

(The Court) I think what you are doing, Mr. Bernstein, is getting the matter confused on storage.

(Mr. Bernstein) The only reason I brought in storage, Your Honor—

(The Court) No, but the witness has testified that "lighted."

Now, then, you are talking about dead storage.

(Mr. Bernstein) What I meant is storage that did not have to be cold storage like poultry—

(The Court) You are talking about where employees walk in and file papers?

(The Witness) Yes, sir, or where you would store supplies, for example.

By Mr. Bernstein:

Q. Could the building at 920 E Street, Northwest, provide it with, just cleaned up, no renovation—

(The Court) Wait. Didn't you testify that you have never seen the building, Mr. Rankin?

(657) (The Witness) Only from the outside.

By Mr. Bernstein:

Q. You are familiar with the description, are you not, by reports made to you? A. Yes, in a general way.

Q. Wouldn't that be a good dry storage for the files?

(Mr. Liotta) Objection.

(The Witness) I cannot say to that degree.

By Mr. Bernstein:

Q. I am leaving the matter of storage now, Your Honor. I will repeat it to save time: Were you familiar with the lease negotiations and the lease on the Charles Smith property at 12th and E Northwest, Washington, D.C. A. Yes.

Q. What were the terms of the lease on that property?

(Mr. Liotta) I object. We are now going into another government lease.

(The Court) I think the objection is sustained. That is a brand new building, is it not?

(Mr. Yochelson) May we approach?

(The Court) Yes.

(658) (At the Bench.)

(Mr. Bernstein) But they argue that it is not worth anything because it is only five years. What is to happen after five years?

(The Court) Rankin does not know.

(Mr. Bernstein) He knows the duration of the lease.

Now, they are talking about the lease after five years.

(The Court) I know. My point is that Rankin or Johnson cannot tell you.

(Mr. Yochelson) We do not want him to tell us that.

(659) (The Court) Johnson cannot tell you what is going to happen five years from now.

(Mr. Yochelson) We feel it is material to show the jury that even for a brand new building, they would be willing to take the building after a five year lease.

(The Court) I still do not follow you.

Stanton Kolb got on the stand and testified that his testimony was predicated on the five year lease.

(Mr. Yochelson) He said based on the value he found as of that date.

(The Court) Mr. Hendrickson got on the stand and said he would not have purchased the building without the five year lease.

(Mr. Yochelson) Yes.

(The Court) But there is nobody in this world that can tell you what is going to happen at the end of five years.

(Mr. Bernstein) That reflects the attitude of responsible business people. Charles Smith would build a new building for only five years of leasing at that moment.

(Mr. Yochelson) We did not have much, I anticipate that argument.

(The Court) But we are going to go back into Charles Smith.

(660) (Mr. Yochelson) 12th and E. I might say in all candor.

(The Court) I cannot understand why you are taking up all of this time in front of the jury.

(Mr. Bernstein) We will withdraw it and save the problem.

(The Court) All right.

(In open court.)

(Mr. Yochelson) If the Court please, it is our information that this is a five-year lease on a brand new building. Now, the point has been made here that all we have is a five-year lease. It seems to me that if it can be shown to the jury that here is a brand new building willing to be leased to the government on a five year lease, the jury may well conclude there is nothing wrong with a five-year lease on our building.

(The Court) But the point is, it is conceded that you have a five year lease.

(661) By Mr. Bernstein:

Q. The government lease on this 920 E Street that we have been referring to, that lease did not include the unimproved land or parking lots, did it? It was only the improved properties, correct? A. The lease covered the improved properties and the small parking area to the rear of the alley but not the properties facing on E.

Q. Did it not include then the 13,000 feet that ran along the eastern boundary of the building to E Street, it did not include that? A. No.

Q. The owners were free to do with that property as they thought best? A. Yes.

(Mr. Bernstein) I think I may be concluded, Your Honor, if you will indulge me for a moment.

You may examine.

Will counsel excuse me. I failed to offer in evidence exhibits marked for identification 6, which is the list of responses to a bid, and 7 which is the penalty bond, and I believe that is all, Your Honor. I offer them.

(662) (Mr. Liotta) I am making an objection now and I request Your Honor to withhold your ruling as to this bid situation.

(The Court) Yes.

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(664) (The Court) Gentlemen of the jury, you have been told that a stipulation is an agreement between counsel that needs no further proof.

The Court's recollection of the testimony—the witness Hendrickson testified the rear parking lot was not included in the sale. Furthermore that the lease was assigned.

Now, Mr. Rankin testifies that in the lease, the parking lot—and counsel for the property owner, and counsel for the government, agree that the sale to Woodmen includes the parking lot in the rear. That is, the unimproved property in the rear.

(Mr. Yochelson) Designated as lot 50.

(Mr. Liotta) I agree that commitment included, Your Honor utilized the word "sale"—and I am not differentiating. But I am saying the commitment included.

(The Court) Yes.

CROSS EXAMINATION

By Mr. Liotta:

Q. Now, Mr. Rankin, you were asked a question in reference to an invitation to bid. What was the number of that bid, sir? A. The number of the bid was S-PB-S-03-0562.

(665) Q. Now, did there come a time when that bid was exhausted? A. Yes.

Q. When was that?

(Mr. Bernstein) Will counsel define what he means by "exhausted"?

(The Court) Yes.

(Mr. Liotta) Did there come a time when the solicitation for space under that bid was fulfilled?

(The Witness) Yes.

By Mr. Liotta:

Q. When that time came, did your agency, according to your records, cause a letter to be sent to either Mr. Dicker, Mr. Fromkin or Mr. Lawrence, or to put it specifically, did they cause a letter to be sent to Mr. David Lawrence at 7400 Glenbrook Road, Bethesda, Maryland, advising him that the awards pursuant to the bids—the bid most advantageous to the government, had been awarded?

(Mr. Bernstein) May we come to the Bench? I want to make an objection.

(The Court) All right.

(666) (At the Bench.)

(Mr. Bernstein) Your Honor, unless the government has proof of mailing, I ask this question be withdrawn. The mere fact that he says they sent a letter, we say no such letter was sent or received. It would not be too relevant but I do not want the record colored by it. Unless they have proof of mailing, I ask that the question be withdrawn.

(The Court) No, we will let him go ahead.

(Mr. Bernstein) He cannot say a letter was sent unless he has proof it was mailed; that is not prima facie evidence.

(The Court) The time element will come out.

(Mr. Bernstein) They did not get such a letter and the lease was on invitation and it so recites.

(Mr. Liotta) This is perfectly explanatory as soon as I get through with this witness.

(Mr. Bernstein) Do you have proof of mailing to this witness?

(The Court) You may proceed. They will introduce proof.

(Mr. Bernstein) May it be understood it will be stricken if they do not connect it up and show proof of mailing?

(667) (Mr. Liotta) They have asked for these records, this is part of the records.

(Mr. Bernstein) Let us not be general. You must prove—

(The Court) Will Mr. Dicker take the stand and say he did not receive it?

(Mr. Bernstein) He does not have to. He says he is not going to take the stand.

(Mr. Liotta) We do not have to prove mailing. I submit under the statute the government files are authenticated and we have a witness here who says they are the files.

(Mr. Bernstein) That is not the proof of mailing, Your Honor.

(The Court) Go ahead.

(In open court.)

(668) By Mr. Liotta:

Q. Do you have the original letter in that file, Mr. Rankin, or an official copy? A. I have the official copy of the letter of June 26, 1962.

Q. Do your initials and name appear on that letter? A. Yes, they do.

Q. Are they located in the right hand side of that letter? A. Yes.

Q. And you are certain here—you are certifying that this was dated what—this letter? A. June 26, 1962.

Q. Read the contents of that letter. A. "Dear Mr. Lawrence.

"Thank you for your recent proposal submitted in answer to our invitation dated February 16, 1962, offering to lease to the government the space at 920 E Street, Northwest, Washington, D.C. This is to advise you that awards have been made to those bidders whose bids were most advantageous to the government, price and other factors considered."

(669) Q. By that letter was Mr. Dicker's bid rejected?

(Mr. Bernstein) Objection.

(The Court) It will speak for itself.

By Mr. Liotta:

Q. You were in on the bid situation, Mr. Rankin; to your knowledge was Mr. Dicker's bid rejected?

(Mr. Bernstein) Object.

(The Court) No, as a result of this letter what happened, if anything?

By Mr. Liotta:

Q. As a result of this letter what happened? A. The invitation for bids was closed out. The requirements advised

thereby had been procured and in the quantity of about 626,000 feet and we took no more space under the invitation.

Q. All right. Now, then, sometime thereafter, did there come a time when there was an urgent need by the United States in the downtown area?

(Mr. Bernstein) Objection.

By Mr. Liotta:

Q. Was there an extra or urgent need for the space?

(Mr. Bernstein) Same objection.

(The Court) Sustained. You can ask what, if (670) any need was there. Leave out the rest.

By Mr. Liotta:

Q. Was there a further need for space in downtown Washington, Mr. Rankin? A. Yes.

Q. The file you brought with you, does that evidence further need by any of your letters in there? A. Yes. As a result of the additional need, we solicited by letter for additional space.

Q. May I ask that before you can go to negotiations, may I ask you must there be some determination made by someone in your department as to a reason under the law to go to direct negotiations? A. The law requires the findings and determination to negotiate in a case—well, there are actually fifteen exceptions to advertising regulations and a number of them require a finding and determination.

Q. Was that done in this case? A. Yes.

Q. Kindly look at your files and tell me what findings and determinations were made, and on what date? A. The findings and determinations were made July 5, 1962, by the Acting Chief of Space Management Division, Mr. Howard Denton.

(671) Q. What did they indicate? A. They indicated—

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(675) By Mr. Liotta:

Q. Mr. Rankin, on Thursday you were going into the fact that the solicitation for bids was fulfilled, is that right?

A. The solicitation by invitation was fulfilled; that is right.

Q. And you had a letter assuring this—that was sent to Mr. Dicker, do you have that letter? A. I do have.

Q. To refresh our recollection tell us again the portent of that letter. A. The letter thanked Mr. Lawrence for his recent proposal submitted in answer to our invitation dated Feb. 16, 1962, offering to lease to the government the space at 920 E Street, Northwest, Washington, D.C. "This is to advise you that awards have been made to those bidders whose bids were most advantageous to the government, price and (676) other factors considered."

Q. Would you kindly remove that letter from the file, please? A. Yes, sir.

Q. Is that the copy, sir? A. Yes, sir.

(Mr. Liotta) May I have that marked for identification?

(The Court) It will be so identified.

(Mr. Liotta) I beg your pardon. We have one already marked.

(The Court) That is what I thought, on Thursday.

(Mr. Liotta) I did not realize that.

Has counsel seen this? I am sorry, Mr. Rankin. You may put that back in your file.

May I offer this in evidence?

(The Court) Is there objection?

(Mr. Yochelson) Yes, sir. It is not admissible.

(The Court) Will you ascertain from Mr. Rankin who wrote the letter?

By Mr. Liotta:

Q. Who wrote that letter? A. Do you mean who signed it?

Q. Who signed it? (676-A) A. John G. Wadsworth Regional Director, Public Building Service.

Q. Before mailing in this in the ordinary course of your government procedure, your initials were attached to that record, is that correct? A. That is correct.

Q. In the normal course of procedure, you keep a copy of that in your file, is that correct? A. Yes.

(Mr. Liotta) May I show this to the jury?

(The Court) I think it has already been read. You can show it to the jury.

(Mr. Bernstein) Your Honor, while the jury is reading that may we look at the file for a moment?

(The Court) Certainly.

(Pause.)

By Mr. Liotta:

In reference to reading the file, not that I have any particular objection but there are now in those files certain confidential information, I am sure.

(The Court) Counsel for the property owners as officers of the Court recognize the confidential material there.

(Mr. Bernstein) Yes, Your Honor.

(677) (Mr. Liotta) Before I proceed with Mr. Rankin, I will need that file.

(The Court) I know it. We are waiting until they get through.

(Mr. Bernstein) May we just read the file later than, sir?

(The Court) Yes, sir.

By Mr. Liotta:

Q. Now, Mr. Rankin, did there come a time when there was a need for additional space in downtown Washington, after this bid? A. Yes, there came such a time.

Q. Would you kindly tell us what was the determination made by your department in reference to this additional space needed, if any? A. The determination was made that there was an additional 700,000 square feet needed, of which there was an urgent need for about 400,000 square feet of additional space in downtown Washington.

Q. And in response to that need, what did your agency do? A. The agency made a final determination under our legislation with respect to advertising and negotiation.

(678) But the need was of such urgency that the exigency would not admit of delay incident to advertising. We, therefore, determined to proceed to acquire the space by direct negotiation.

Q. Tell us how much space was needed in downtown Washington, and in what period of time? A. We needed approximately 400,000 square feet, to be delivered as soon as possible, but not later than May 16, 1963.

Q. Did you make a determination as to how much space was available in downtown Washington that would meet your needs in the time required. A. Yes, as a result of our canvassing, advertising, listings which are submitted to the office from time to time, we knew substantially who had space, potentially available within the time allotted.

Q. How much space was available within that time allotted? A. There were about twelve locations which could provide space which were potentially capable of providing space within the time allotted.

Q. In response to your need what did you do? A. We issued letters soliciting—letters of (679) solicitation to all known parties, asking for negotiated proposals.

Q. Were the defendants in this case one of the parties that you solicited for space? A. At least one of them was, sir. Mr. Dicker was solicited.

(The Court) Just to clarify it. Mr. Dicker was one of the owners of the property in question?

(The Witness) Yes, sir.

(The Court) He did not have any other bid?

(The Witness) No.

By Mr. Liotta:

Q. That was in reference to this particular property, is that right? A. I do not believe the solicitation letter specifically mentioned this property but we knew of its availability from his prior evidence of interest in our space requirements.

Q. After the soliciting of this space, did you finally arrive at a position where you had sufficient space available? A. Yes, sir.

Q. How much space did you need within that time period in downtown Washington and how much was available? (680) A. We needed approximately 400,000 square feet.

Q. How much space was available to be delivered within the time period prescribed by your agency?

(Mr. Bernstein) Object unless he knows actually how much was available. Not that he would particularly have to know about.

(Mr. Liotta) Your Honor please—

(The Court) What he knew about.

(The Witness) The total square feet available potentially would total in excess of 600,000 square feet.

By Mr. Liotta:

Q. Six hundred thousand square feet available? A. Potentially available.

Q. What do you mean "potentially available?"

How much was there to be delivered within the time period as set forth by your agency?

(Mr. Yochelson) I submit he answered the question. I submit he is now arguing with him.

(Mr. Liotta) I am not arguing with him. I am asking the question.

(The Witness) If I could restate that, please. Within or near the central business district there was 400,000 square feet. There was a total of about in excess of 600,000 potentially available within the city.

(681) By Mr. Liotta:

Q. How much did you need again for downtown Washington? A. About 400,000 square feet.

Q. How much was available?

(Mr. Yochelson) Objection.

(The Court) Yes, the gentlemen of the jury are listening to the testimony.

(Mr. Liotta) I am sorry.

By Mr. Liotta:

Q. Now, Mr. Rankin, you were asked by counsel to—as to appraisal made by GSA for the purposes of this lease. Do your records there indicate the amount of that appraisal made after considering the building as improved? A. Yes, they do.

Q. How much was the appraisal as approved in your office?

(Mr. Yochelson) The best evidence would be the appraiser. This witness' testimony would be only hearsay.

(Mr. Liotta) I submit they put Mr. Rankin on the witness stand and went into this appraisal business. If he has the records there, they have opened the door. Now, all I am asking is—because they have based their fifteen per cent on the economy act.

(The Court) Mr. Yochelson, didn't you bring (682) out the appraisal?

(Mr. Yochelson) We asked if it was necessary under the Act to have an appraisal.

(The Court) Didn't you ask if he had an appraisal?

(Mr. Yochelson) Yes, we did. We ask him who made it and he told us about Mr. Reynolds making it.

(The Court) What objection do you have to his testifying about the appraisal?

(Mr. Yochelson) Our only objection is this, if Mr. Reynolds were called we would have the opportunity to cross examine him with respect to it. We do not have the opportunity to cross examine who did not make it.

(The Court) You do not want the appraisal to be introduced.

(Mr. Yochelson) I have no objection if it is introduced by the man who made it.

(The Court) Objection will be sustained.

(683) (At the Bench.)

(Mr. Liotta) Your Honor please, and I respectfully am not talking after Your Honor has made his ruling because I do not mean to do that. But in reference to the fifteen percent under the Economy Act, they, by inference, said that the rental had to be within fifteen per cent, and therefore, it would infer by reversion that the appraisal was much higher than what it is. I am offering to prove at this time the appraisal which was made by Mr. Reynolds, after the building was completed, was somewhere in the neighborhood of \$2,400,000.

(The Court) I do not understand why the property owner, having raised the question—because, obviously, the jury now has the question that you do not want it to come in. Where is Reynolds?

(Mr. Liotta) I do not know. He is with GSA.

(Mr. Sluga) He is in private industry now. He has left GSA.

(The Court) Do you know where?

(Mr. Sluga) No, I do not. I could find out, perhaps.

(684) (Mr. Liotta) We could find him. But, Your Honor, all this testimony as I respectfully reserved my objection before as to this testimony, after a building has been improved, but they have opened the door, and they put us in a position of having the jury feel that this fifteen per cent situation makes this appraisal considerably in excess of what it was.

(The Court) But you have offered it.

(Mr. Liotta) Yes. His records show what the figure was.

(The Court) They have objected.

(Mr. Liotta) Yes, sir.

(The Court) That is the property owners have objected. So, obviously, the inference is that I would think that the property owner would let it come in, having raised it.

(Mr. Liotta) Yes, sir.

(The Court) Ask Rankin where Reynolds is so that the jury will know he is no longer there; if he knows where he is, we may be able to get hold of him.

(Mr. Liotta) Yes.

(685) (Mr. Liotta) I again reserve my objection to this type of evidence. This testimony that they elicited on direct examination, that they elicited certainly goes to the appraisal that they were getting at when the lease was entered into.

(Mr. Bernstein) May I make a suggestion? If they can let us look at that file, we will take a few minutes recess, we may withdraw our objection.

(Mr. Liotta) If Your Honor, please, in those files—not that we have anything to hide—but in those files are confidential records of the GSA. There are here, of course, under—

(Mr. Bernstein) Your Honor, counsel—

(The Court) What is confidential?

(Mr. Liotta) I withdraw my objection to the whole thing.

(The Court) This government does not operate in a confidential manner.

(Mr. Bernstein) May we have a short recess and examine the file? We may finish more expeditiously?

(The Court) Yes.

(686) (Mr. Yochelson) If the Court please, after having reviewed the files, we are withdrawing our objection to the admission of the appraisal, if the appraisal and its supporting documents are offered as an entirety.

(Mr. Liotta) The conditions they attach to the submission of this evidence, I can not consent to. Some of it has the deposit mentioned which is not prejudicial but I do not think it should go in.

(The Court) The Court will not rule on it because counsel for the property owners may supplement it with any information you feel is pertinent and material. Do you understand that?

(Mr. Liotta) May my objection be noted, Your Honor, to Your Honor's ruling on the record?

(The Court) Yes.

(Mr. Liotta) All right.

By Mr. Liotta:

Q. Now, Mr. Rankin, in reference to the fifteen per cent provided for by the Economy Act, would you kindly explain that to me and the Court, if you please.

(687) What is the portent of that fifteen per cent? A. The portent is that that is the upper limit permitted by law, it is fifteen per cent of the fair value of the premises at the date of lease.

Q. That is the upper limit? A. It is the legal maximum.

Q. In reference to the particular property, does the effect—strike that.

Does it affect the fifteen per cent factor if services and so forth are provided by the United States in the event the lease culminated? A. The fifteen per cent limitation is on the use of the building. The reasonable value of operating services such as heat, cleaning, electricity, may be added to the legal maximum.

Then the bare rental as I understand it of \$388,000 may, in no way, possible be related to the actual fifteen per cent figure, is that right?

(Mr. Yochelson) I object to that question, the Court please. The answer indicates to the contrary.

(The Court) Yes.

By Mr. Liotta:

Q. Is the fifteen per cent factor related to the rental of this particular property? A. It is related only insofar as that is the (688) legal maximum.

Q. Well— A. There are other limitations.

Q. What are they? A. Administrative limitations. For example, we are—it is part of the regulations, not allowed to pay rental in excess of that paid by other people for similar space without justification. There are some other guide lines that we employ from time to time, based on pure economics. If a rental may appear reasonable on the basis of comparable rents, we may still administratively conclude that the rental is excessive based on the return, the investment that the owner may have in it.

Our general guide line is about nine per cent, after deduction of expenses and fixed charges.

Q. In reference to the lease in this particular case, was there a possibility for this amount of rent to go down in the event or under certain conditions? A. Yes, if the market value—the fair market value—

(Mr. Yochelson) Excuse me. Your Honor, please, I submit that the lease speaks for itself.

(Mr. Liotta) May I have the lease again, please?

(689) By Mr. Liotta:

Q. Mr. Rankin, you are familiar with these leases. In this lease, is there anything that refers to the fifteen per cent factor under the Economy Act? A. As to what is presented here, there is not. But there is incorporated by reference some additional data.

Q. What additional data is incorporated by reference? A. Certain papers such as the copy of the Invitation. Solicitation letter, Government's acceptance letter and lessor's option.

Q. And somewhere in those particular documents is there any reference to the fifteen per cent Economy Act? A. May I ask a question? Do you mean by that any reference to the limitation, or to the Act, itself?

Q. The limitation. A. Paragraph 2 of General Provisions which is incorporated in the lease by reference.

Q. What does that say? A. Fair market value and fair rental value. Restrictions imposed by the Economy Act of 1932 (40 USC 278 A) limit the amount of rental which may be paid and necessitate a determination of fair market value on all leases involving a rental in excess of \$2,000 (690) per annum. Appraisals will be required in support of that determination and much of the basic material therefor must be furnished by the lessor from building records.

"Successful bidders shall make available to the government for appraisal for fair rental value purposes any pertinent information which is in his possession."

I believe there is another reference, if you will give me just a moment, please.

In Schedule A, paragraph 13 (a).

Q. What does that say? A. That is entitled "Limitations as to Net Rental Price."

Subparagraph (a).

"The term 'net annual rental' as used herein means the rental to be paid by the government for the bare use of the leased premises, including the lessor's cost of maintaining the demised premises in good repair and in rentable condition, but excluding the cost of utilities and building services such as heat, light, janitor, and so on. The net annual rental may not exceed fifteen per cent of the fair market value of the leased premises which is a restriction imposed by the Economy Act of 1932 (691) (40 U.S. Code 278-A)

"Prior to lease award an appraisal will be made by the government to determine the fair market value and the fair rental of the premises offered. The appraisal will be re-affirmed as of the date of occupancy of the space by the government. If the final appraisal indicates that the net annual rental will exceed fifteen per cent of the fair market value of the leased premises, the total net annual rental payable to the lessor will be the maximum amount allowable under the limitation imposed by the Economy Act."

Paragraph 14:

"Appraised fair market value:

"The appraised fair market value required under the provisions of paragraph 2, General Services Administration Form 1363, maybe a preliminary appraisal used, estimated construction or alteration costs based on plans and specifications to be furnished to the successful bidder. Before occupancy of the building by the government the appraisal will be up-dated (692) in order to insure compliance with rental limitations imposed by the Economy Act of 1943 (U.S. Code 278-A)."

Q. Under those provisions was it possible that the rental described in the lease could be reduced?

(Mr. Yochelson) Objection.

(The Court) Sustained.

The gentlemen of the jury have heard the witness testimony.

By Mr. Liotta:

Q. Now, Mr. Rankin, did the government in accordance with your statement last made make an estimate of the cost to put in these improvements? Before I ask you to answer that question—

(Mr. Liotta) Your Honor, I would like the record to show again that I object to this whole line of testimony, and this was opened up by the defendants, with reference to this type of question.

(The Court) The record will so reflect.

By Mr. Liotta:

Q. Was there an estimate made by someone in the GSA as to the cost to make this property into an office building?
(693) A. Yes, such an estimate was made.

Q. Do you have the record there? A. Yes, I do.

(Mr. Yochelson) I submit now that what Mr. Liotta is asking the witness to do is to testify as to an estimate someone else made to put the building in condition, renovate it or do this work. Originally we objected to the appraisal. However, we withdrew our objection after looking at the file—if everything went in. I do not think he ought to ask for a piece of it to go in.

(The Court) Are you objecting at this time?

(Mr. Yochelson) Yes, Your Honor.

(The Court) The objection is overruled.

By Mr. Liotta:

Q. Do you have your record before you, sir? A. Yes.

Q. Would you tell me who made the estimate for GSA?

A. Speaking of the estimate of the expenses to convert the building to office space?

Q. Yes, sir. A. The estimate was made by Mr. George B. Plush, Jr.

(694) Q. Was he employed by the GSA? A. Yes, sir, Mr. Plush was a member of the Region 3 staff, and at the time of the estimates was Acting Regional appraiser.

Q. What was the amount of his estimate to make? A. \$1,650,000 was his estimate.

* * * * *

(698) (Mr. Yochelson) While we are here—the reservation of ruling that Your Honor made with respect to the appraisals. My exception to that.

* * * * *

(701) By Mr. Bernstein:

Q. In connection with Mr. Liotta's questions to you about the Economy Act and the bearing on the rental there, can you explain how the increased rent of four hundred and some odd thousand dollars per year would be paid after the fifth year under the Economy Act were the government to exercise its option.

(Mr. Liotta) Objection. It is an option period which may not be taken.

(The Court) Sustained. That is pertaining to the option, is it not?

(Mr. Bernstein) Yes, sir.

(The Court) You concede there is nothing binding on the option.

(Mr. Bernstein) I concede that. At the same time the government did have the right and presuming the government would exercise that right.

(The Court) The objection will be sustained.

By Mr. Bernstein:

Q. Is it correct that the appraisal made on behalf of the government was by law required to be made before the lease was fully and actually executed?

(702) The law does not require that an appraisal be made. The law merely requires that the rental shall not exceed fifteen per cent of the fair market value of the premises at the date of the lease.

Q. Let me put aside the word "appraisal."

Would there not have to be some determination by the government, some determination before the lease was executed—to assure the government they were within the Economy Act in making this lease? A. Yes. That was the purpose of our estimate of value.

Q. And this determination then was made by the government before the lease was signed, is that correct? A. A determination was made that the rental would be within the limits.

Q. Of the Economy Act.

Is this a determination which was made before the lease was signed? A. Yes. A determination was made to the extent that it was in compliance with the contract. The contract required the preliminary estimate and then later confirmed the estimates.

Q. Now, Mr. Liotta asked you a series of questions relating to the conversion of the search for space from (703) an invitation to bid to a negotiated level. In that connection it is a fact, is it not, that all of the terms of the negotiations were, all of the several bidders—were conducted within the conditions and terms of the original invitation, were they not? A. Yes, that is right.

Q. And it is a fact, is it not, that this particular lease and the leases that were similarly negotiated, all of them carried a provision that the leases were subject to all the terms and conditions set out in the invitation, is that not correct? A. That is correct.

Q. Now, you did not mean to convey to this jury, did

you, any impression that the government was over a barrel in connection with these negotiations and—excuse the expression—I think you know what I mean. The government was not under any duress to cause them to pay more for the space than they otherwise would have?

(Mr. Liotta) Objection. He is asking for a conclusion that this witness can not answer.

(The Court) What?

(Mr. Liotta) He is asking for a conclusion as to what the Administrator and everybody else did here and it has no relevancy.

(The Court) Sustained.

(704) By Mr. Bernstein:

Q. Well, these negotiations were free and open and objective and fair between both sides, were they not?

(Mr. Liotta) Objection. He is asking for a conclusion again. This goes right into the law.

(The Court) The objection is sustained on the basis that the government has not objected to the lease.

By Mr. Bernstein:

Q. As a matter of fact, when this building was assigned for use by the Department of Labor, and I am talking about 920 E Street, Northwest, of course. A Yes, sir. Our intention was to occupy it with the Department of Labor.

Q. The Department of Labor never got to occupy it, did they, in fact? A. No, the alterations were never completed.

Q. The alterations were completed—they were not completed because the government stopped the work?

(Mr. Liotta) Objection.

(Mr. Bernstein) I did not move that his remark be stricken, Your Honor.

(The Court) Wait just a moment, gentlemen.

(705) It is conceded that the building was not built, is it not?

(Mr. Bernstein) If the Court please, I want to get the next point.

The fact is other space was found for the Department of Labor, was it not?

(Mr. Liotta) Objection, Your Honor.

(The Court) The witness can answer it. Do you know the answer?

(The Witness) Yes, Your Honor.

(The Court) All right.

(The Witness) Yes. Space was found for the Department of Labor at some later date. I could not be precise as to its precise activity but it was the Department of Labor.

* * * * *

(706) JOSEPH VENNERI

a witness, being first duly sworn, was examined and testified as follows:

(Mr. Bernstein) May I have these marked?

(The Clerk) Defendant 8 for identification.

(Defendant Exhibit 8 marked for identification.)

(Mr. Bernstein) If the Court please, I am having as defendant Exhibit 8 all of these blue print sheets, collectively.

(The Court) Has Mr. Liotta seen them?

(Mr. Bernstein) Yes, these are the same ones.

(Mr. Liotta) You are offering them?

(The Court) They are just identified.

(707) DIRECT EXAMINATION

By Mr. Bernstein:

Q. State your full name. A. Joseph Venneri.

Q. Where do you reside? A. 15616 Old Chapel Road, Bowie, Maryland.

Q. What is your business? A. General contractor.

Q. How long have you been in that business? A. Oh, on and off for 17 years.

Q. Now, as to what company or organization are you now connected with? A. Three Crowns Enterprises, Inc.

Q. For how long? A. Since the first of January, 1963.

Q. Prior to that time were you otherwise connected or affiliated? A. Yes.

Q. With whom? A. Arthur Venneri Company.

Q. Is that a corporation? A. Yes.

Q. And the name of Arthur Venneri, is that person (708) any relation to you? A. My father.

Q. Is he deceased now? A. Yes.

Q. When did he pass away? A. November, 1963.

Q. How long were you in association with your father's business? A. Approximately sixteen to seventeen years.

Q. What was the business of the Arthur Venneri Company? A. General contractors.

Q. Did that company do any business in the Washington, D.C. area—the metropolitan area? A. Yes.

Q. State some of the buildings, some of the building projects they did as general contractors? A. The New National Library of Medicine in Bethesda; The Federal Deposit Insurance Company.

Q. Did you—will you please speak louder.

You said the National Library of Medicine in Bethesda, Maryland? A. Yes.

Q. That is the one that is presently the Naval (709) Hospital? A. Yes, sir.

Q. What are some of the other building projects? A. The Federal Deposit Insurance Corporation Building.

Q. Is that the building across 17th Street from the Old State Department? A. Across from the Executive Offices of the White House.

Q. Go on. A. The Federal Aviation Building in Leesburg, Virginia. Two buildings for the Space Agency, they were entitled Building No. 6 and Building No. 8. The Atomic Reactor for Walter Reed Army Medical School; the Army Map Service Building for the Corps of Engineers.

Q. The Army Map service, is that the one up-river above Glen Echo or somewhere in that area? A. Yes.

Q. Go ahead. A. We did a secret job for the Corps of Engineers.

Q. Were you an officer and official of the Arthur Venneri Company? (710) A. Yes, vice president.

Q. In the year 1962, what were your actual functions with that company—what did you do specifically? A. I was in complete charge of the Washington office and the metropolitan area in Washington, for Virginia and Maryland. I had under my control the Denver Colorado office, the Miami office.

Q. Could you make an approximation in the year 1962, say, or some period such as that, how much construction your company was engaged in dollarwise?

(Mr. Liotta) Object.

(The Court) Overruled. The witness may answer.

(The Witness) I would estimate between 30 and fifty million.

By Mr. Bernstein:

Q. Did there come a time when the owners known as 920 E Street, Washington, D.C., known as the Old Merchants Transfer—

(The Court) Are you submitting Mr. Venneri as an expert?

(Mr. Bernstein) In the general contracting field.

(The Court) Any questions?

(Mr. Liotta) I would like to reserve my questions.

(711) (The Court) All right.

By Mr. Bernstein:

Q. To repeat, did there come a time with reference to property known as 920 E Street, or the Old Merchants Transfer property, that the owners had discussions with you as a representative of the Arthur Venneri Company as to your doing the job of reconstruction there? A. Yes.

Q. In that connection were you given or shown any plans or specifications by the owners? A. Yes.

(Mr. Bernstein) Mark this No. 9.

(Defendant Exhibit 9 marked for identification.)

By Mr. Bernstein:

Q. I show you two sets of papers, one marked collectively for identification Exhibit 8, and one marked defendant's Exhibit 9 for identification, and ask you if you recognize these or both of these sets of papers.

I believe the question was, do you recognize these two papers, or documents? A. There are some slight changes to these and the ones that I looked at.

Q. Explain what these appear to be and what you (712) saw. A. It is difficult to say without a copy of the revised set that we looked at, which was I guess as late as the 21st of December, 1962.

It seems these were printed a little later than that. It is trivial—these changes.

Q. Did you have a set of plans and specifications supplied to you? A. Yes, which were very similar to these.

Q. Were those detailed plans and specifications? A. Yes.

Q. They were not what is sometimes referred to as "pre-

liminary." A. No, these were detailed plans and specifications.

Q. Was it in the kind of detail which would permit you as a general contractor to construct right from them? A. Yes, they were similar to these.

Q. Such plans and specifications were supplied to you? A. Yes.

Q. Incidentally, I believe I forgot to ask you: Have you had any formal education in engineering or (713) construction? A. Yes, I have a Bachelor of Science in Civil Engineering from the University of Michigan.

Q. Civil Engineering? A. Yes.

Q. When you were asked by the owners to consider this job, did you make any inspection of the improved buildings, 920 E and the building behind it? A. Yes, sir.

Q. Did you make any observations with respect to the floors there and the walls? I am talking about what we might call the skeleton or structure of the building. A. Yes.

Q. Would you state what your observations were as to those items—what was the condition of the walls and the floors? A. The walls and floors of the building were in pretty good shape. The basis, it seemed to me was to not—well, to demolish the interior and to rebuild it, with the specifications of the—not exactly a new—but almost a new-type office building and the structure, itself (714) would take this technical change and become a good office building.

Q. Now, in terms of the condition of the walls and the floors as you saw them, did you form any opinion as to how long those walls and floors might last to support a renovated new office structure? A. Well, it is completely a personal opinion. I would say that building could stand for fifty years.

Q. Now, when you were supplied with these plans and specifications, what did you do in that connection—did

you do anything with them? A. Well, yes. We estimated the cost for rehabilitation of this building to the plans and specifications which we were given. When you say "we," now, I mean the organization. I do not do all of the work, myself.

Q. Did the men who worked on the analysis work under your supervision and direction? A. Yes, sir.

Q. Did you collate the analysis when they completed it? A. Yes.

Q. Did you do the same kind of analysis and collation of information with respect to those plans and (715) specifications that the company would do on any job that it was requested to bid on as a general contractor? A. Yes.

Q. What does that involve for the enlightenment of the Court and the jury—what do you do when you are figuring out a building? A. Well, we determine this by, I guess actually a brick and mortar-takeoff.

Q. What is that expression? A. A brick and mortar takeoff.

Q. Takeoff? A. Yes. You basically build the building from the ground up in your own mind or on paper and estimate what you feel this construction can be done for.

Q. Did you do that with respect to the various components of the job, like electrical, plumbing, brick work, elevator and whatever the other components of such a structure are? A. It is the practice of most general contractors to take some subcontractor bids for general items. However, the Arthur Venneri Company had a great many subdivisions and many other connected corporations in certain fields. So, we took off a good part of the job, ourselves.

.

(716) By Mr. Bernstein:

Q. Did the Arthur Venneri Company, as a result of the labors you have described, arrive at an opinion as to what

it would cost to do this job in accordance with the plans and specifications?

Did you arrive at an opinion? A. Yes.

Q. Did you, personally, arrive at an opinion in that connection? A. Yes.

Q. What was your opinion as to what it could cost to renovate this into a modern office building based on the plans and specifications supplied by the owner?

(717) (Mr. Liotta) Objection.

In the first instance, those plans and specifications—we do not know what we are talking about yet. Those plans are not in evidence. It is a question of an estimate, sir.

(Mr. Bernstein) If the Court please—

(The Court) Overruled.

Let us proceed.

By Mr. Bernstein:

Q. State what your opinion was, Mr. Venneri. A. Could I understand that a little more closely? Did you mean what we felt the cost of this construction would be?

Q. I will eliminate the word "cost." Did the Arthur Venneri Company, through you, arrive at an opinion as to a fair price to do this job in accordance with plans and specifications? A. Yes, we did.

Q. What was the figure that was so arrived at? A. That figure which we were expected to draw our contract under was \$1,380,000.

(Mr. Liotta) I object to this line of examination. I respectfully submit that now counsel is impeaching the testimony of his own witness.

(718) (Mr. Bernstein) I strongly object to government counsel making such a characterization as 'impeaching' in the presence of the jury.

(The Court) You say one million three eighty.

(The Witness) Yes.

(The Court) Proceed.

By Mr. Bernstein:

Q. Did the Arthur Venneri Company submit a written proposal to that effect? A. Yes.

Q. Do you have a copy? A. No, not with me.

Q. Do you have it available in the City of Washington?
A. I do not know if I have another copy in my office or not but I know there should be copies in the main office in Westfield, New Jersey.

Q. The government took your deposition a few weeks ago, did they not?

(The Court) Wait just a moment. Wait just a moment. This is your witness.

(Mr. Bernstein) I am just trying to find out where a copy is.

(719) (The Court) He said it was in Westfield, is that correct?

(The Witness) I believe there would be a copy there, yes.

By Mr. Bernstein:

Q. Did you leave a copy with anyone in the last few weeks that we could get hold of? A. I left an original copy of an original proposal.

Q. With whom—do you recall? A. Yes. It was at a deposition. However, that was not the proposal that we followed through when we consummated the contract, and that again is my opinion.

Q. Mr. Venneri, I am just trying to undo some confusion here. I have been supplied with the document you appear to have left.

I was not referring to that document but was referring to a written proposal by the Arthur Venneri Company.

Do you know where such a copy is available? A. I believe I left a little booklet also with the proposal in it. I think—in fact, I know—the price that was in that book varies from the price I just (720) gave you because that was the first proposal that was given to the owners.

(Mr. Bernstein) Would the Court indulge me for just a moment?

(The Court) Yes.

(The Witness) That is it (pointing to document.)

By Mr. Bernstein:

Q. I hand you a paper writing which has not yet been marked for identification but for the record I will ask to have marked—give it to me a moment.

(Mr. Bernstein) Would you mark this for identification as Defendant Exhibit 10.

(Defendant Exhibit 10 marked for identification.)

By Mr. Bernstein:

Q. I ask you whether you recognize this paper writing.
A. Yes.

Q. Was that the written proposal submitted by the Arthur Venneri Company to do this office—modernization job? A. This was the first written proposal that we had given them.

(721) Q. That proposal was for what amount? A. \$1,440,000—\$1,140,250.

Q. Did there come a time when there was a subsequent proposal by the Arthur Venneri Company to the owners?
A. Yes.

Q. Was that a revision of the one you hold in your hand?
A. Yes.

Q. What was the nature of the revision and what was the revised price? A. The revised cut was the figure I gave you, I believe. I am sure it was very close to it—\$1,380,000—that number sticks in my mind.

Q. What was the reason for the revision? A. We found places where we bid—to eliminate certain items of work that we had felt we could not do on the first go around.

Q. All right.

(Mr. Bernstein) I offer in evidence Defendants Exhibit 8, 9 and 10 for identification.

(Mr. Liotta) Object. May I approach?

(The Court) Yes.

(722) (At the Bench.)

(Mr. Liotta) I object to the offer of the plans and specifications and the contract into evidence for all the reasons heretofore set forth including the frustration, compensation for the frustration of the defendant's business plans, covered with the direct relationship to the particular need of the United States, and further, that it refers to a hypothetical office building that is not in existence and is not in relation to the issue in this case, just compensation for the property taken.

Further, this is not a bona fide contract. It is merely an estimate to make improvements as to this property in the future.

(Mr. Yochelson) I submit that this is not the plans as to a hypothetical office building. These are plans of an office building that was approved—the plans were approved by the District of Columbia. Permits were issued and work was already in progress. This was not speculative. It was all ready.

(The Court) You are not introducing it through (723) Mr. Vanneri's testimony.

(Mr. Yochelson) No.

(The Court) He does not even identify these. He said they were similar.

(Mr. Bernstein) These were a later print. We got them for a deposition. He used the word "trivial" that it was

even more of a diminution than that—that they were the same plans.

(The Court) Objection overruled. They will be received.

(724) (In open Court.)

(Defendants Exhibit 8, 9, and 10 received in evidence.)

By Mr. Bernstein:

Q. Do you have a copy of that revised estimate with you that you gave the owners? A. No.

Q. I show you Defendant Exhibit 4 which has already been admitted into evidence, and ask if you have ever seen this or another print of the same thing? A. I saw something similar to that.

Q. Do you recognize what it is? A. What it was proposed to be, yes.

(Mr. Bernstein) I assume at an appropriate time the jury will get an opportunity to look at all of these exhibits. This is already in evidence.

(The Court) The important factor is: Mr. Vanneri—did you draw any of these plans?

(The Witness) No, sir.

(The Court) They were submitted. Not necessarily plans, but other plans were submitted?

(The Witness) Yes.

(The Court) Then you made a proposal?

(The Witness) Yes.

(725) (The Court) And you made it to the owner?

(The Witness) Yes.

(The Court) Then you revised a proposal?

(The Witness) Yes.

(The Court) Now, you do not have either one of those with you?

(The Witness) No, sir.

(The Court) They are where?

(The Witness) They should be in the office in Westfield.

By Mr. Bernstein:

Q. The offices of Arthur Vanneri Company? A. Yes.

Q. You are no longer with Arthur Vanneri Company since you father died? A. No, I am not.

(Mr. Bernstein) You may examine.

* * * * *

Q. Did you ever, you or Three Crowns Enterprises, or the Arthur Vanneri Company, ever enter into a written agreement with the owners of 920 E Street wherein you agreed in writing by contract to reconstruct or remodel (726) the premises? A. Not a written agreement, no.

Q. The answer is no. A. Yes.

Q. Then this proposal that you had, you did not consider the proposal legally binding upon you or your company? A. I thought we had a verbal contract, Mr. Liotta.

Q. Do you recall answering this question at the depositions that you referred to before—

(Mr. Bernstein) What page?

(Mr. Liotta) Well, page 19.

(The Witness) I recall answering either a similar question—

(The Court) Wait just a moment.

By Mr. Liotta:

Q. I will ask you the question.

“I refer to this paper that you have before you. You said contract. There was no contract? ‘A. Proposed.

“Q. There was no contract? ‘A. There was no written contract.

"You weren't bound, were you? (727) "A. No."

Do you recall answering that?

(Mr. Bernstein) If the Court please, I submit that counsel is being unfair to the witness. I ask him to read the next question and answer. May I read it to connect it up?

(The Court) You can read it at the proper time.

(Mr. Liotta) Would he let me finish?

(The Court) Certainly.

By Mr. Liotta:

Q. I asked you then, "did you consider the Dicker Company bound? A. Verbally, yes.

"Q. Verbally?

"I am talking about legally. A. No."

Do you recall that? A. Yes.

Q. So that you did not under any terms or conditions consider yourself legally bound for remodeling of this property under any contract, did you? A. Again I can answer it the same way, verbally I felt we had a contract.

(728) (The Court) Wait just a moment.

(The Witness) And technically, no.

(The Court) How long have you been in the business?

(The Witness) Seventeen years.

(The Court) You have signed agreements, do you not?

(The Witness) Yes, sir.

(The Court) You would not spend \$1,380,000 without a binding agreement, would you?

(The Witness) No, we would not.

(The Court) All right.

By Mr. Liotta:

Q. Now, you had mentioned that you are the vice president of Arthur Vanneri Company, is that right? A. Yes, sir.

Q. You were? A. Yes, I was.

Q. At what time were you vice president of the Arthur Vanneri Company? A. Until the first of January, 1963.

Q. And at that time you were no longer in a position to bind the Arthur Vanneri Company, is that right? (729) A. That is right.

Q. And on January 18, 1963, you could not bind the Arthur Vanneri Company, is that right? A. No, I could not.

Q. Your contemplated contract or estimate was with the Arthur Vanneri Company and the defendants in this case; is that right? A. Yes.

Q. And you are also, sir, an officer of the Three Crown Enterprises, is that right? A. Yes.

Q. Did Three Crown Enterprises enter into any written binding agreement in connection with you or your corporation with the owners? A. No.

Q. Now, when you say you made an estimate, did you get actual estimates from subcontractors in the Washington area to support your proposal? A. Yes.

Q. And from whom did you get those estimates? A. I can give you the major ones which I can recall. We received masonry proposals from Mark Masonry; we received the mechanical from Pool & Kent; electrical proposals from Fischbach and Moore; bulk of the work (730) I would say that we took off and estimated with our own corporation.

Q. With these subcontractors you mentioned, did you have any binding agreements wherein they were legally bound to supply the services and material as you estimated for the completion of this job into an office building? A. No.

Q. Now, sir, when you refer to the Arthur Vanneri Com-

pany, is that what is called in the trade 'A union Company'? A. Yes.

Q. Now, are you familiar with the United States Department of Labor decision of the Secretary in reference to this job? May I show it to you? A. Yes.

Yes, I am familiar with that.

Q. You are familiar with it? A. Yes.

Q. And generally a decision of this type provides what, in so far as union rates are concerned? A. Minimum wage requirements.

Q. In accordance with Union Rates, is that right? A. Very close to union rates.

Q. And your estimate of \$1,480,000— (731) A. \$380,000—\$1,380,000.

Q. \$1,380,000, was that in accordance with this decision of the Department of Labor? A. Yes.

Q. Now, was the Three Crown Enterprises Company, a union or non-union company? A. Non-union.

* * * * *

(732) (At the Bench.)

(Mr. Bernstein) I submit what counsel reads from the deposition is supposed to be read in connection with the question asked. The question he asks in connection with the oral offer made to do this through Three Crowns as a non-union—I only asked about a union job and now he is trying to ask him something out of context.

(Mr. Liotta) If Your Honor, please, counsel has ample time to submit the whole deposition. At this point I am attacking this witness' credibility under oath. He told me under oath, this was not the only estimate made, that "we made a non-union estimate,"

(Mr. Bernstein) If the Court please, you just asked if he had a written contract with Three Crowns. He never testified as to a written contract. You say I have ample

opportunity to introduce the deposition. We asked for that the other day and you would not agree.

(The Court) Isn't the law that the witness—that he has to bid union prices anyway?

(733) (Mr. Liotta) Not necessarily.

(The Court) I think he does.

This can be off the record.

(Discussion off the record whereupon Court took a short recess.)

(734) By Mr. Liotta:

Q. Mr. Vanneri, you had stated that Arthur Vanneri was your father. A. Yes.

Q. Did you discuss this case with your father? A. Yes.

Q. Did your father show any interest in taking this job? A. He was against it.

Q. Why? A. Against taking the job.

Q. Why? A. Well, I do not know. It is a tough thing to explain. It is just that in discussing it, he basically did not—maybe it was the nature of the construction compared to some of the jobs we were doing—the type of construction or maybe just a personal feeling—but he just did not want to take this job.

Q. You felt that the Arthur Vanneri Company was verbally bound to take this job? A. Yes, I did because of a meeting we held in New York.

Q. Thank you. That you were verbally bound, is that it? (735) A. Yes, sir.

Q. Now, referring to page 22 of your deposition, in reference to a question asked of you by Mr. Bernstein:

“By Mr. Bernstein:

“Q. It is also true, is it not, that in anticipation of finally reaching a firm agreement that could be reduced

to writing, you had already purchased some supplies for the reconstruction, itself, such as windows and so on, had you not?

"(Mr. Liotta) I object to that. The witness did not state that. It is incompetent, irrelevant and immaterial.

"Q. Will you answer now? 'A. The Arthur Vanneri Company purchased the windows?

"Q. Yes, for this particular job. "A. Yes.

"Q. It is also true, is it not, you were still discussing at Three Crowns the job with the owners and the written agreement at the time when the property was condemned by the government, is that true? (736)
"A. Yes."

How do you explain those statements made on deposition and it is your testimony now that you were verbally bound as the Arthur Vaneeri Company? A. Because my father wanted to get out of the contract, and as long as it would have been amicable to both parties, and I felt that it would have been—I would have taken the job as Three Crowns Enterprises and would have released the Arthur Vanneri Company from it, on the basis I felt the Three Crowns Company could do the job cheaper for them.

Q. You felt you could do it cheaper as Three Crowns? A. Yes. Three Crowns Enterprises was operating as a non-union form. It does not today. It operates in the District of Columbia as Union and in the surrounding area as non-union.

Q. How do you or how could you do it cheaper? A. Because of the difference in the minimum wage rates and the union scale is basically substantial.

Q. Did you have any agreement with the others in the event you did this property under Three Crowns? A. Did we have any—no.

(737) Q. Was a savings clause in a contract? A. A savings clause, as we would offer to an owner, would be such that they would receive a percentage of what we felt

we could save below a maximum contract price which we would give to them—and we would receive a percentage.

Q. That is a rather risky supposition, "that you could save"? How do you go about that? What do you do? A. There are two different methods, naturally.

The first is, especially with a job of this nature, you have the possibility of when you actually have a contract in your hand, of getting a subcontractor; to take a price, getting another subcontractor cheaper than the amount you anticipate spending. Or, in doing a job again of this nature, there are many unforeseen circumstances that you might run into so you allow for these in putting your estimate together, and you can possibly get the job done cheaper when you are performing your work.

Q. Does that have a colloquial name, in so far as contractors are concerned—what do they call that? A. Using the word "buying" the subcontractors.

Q. In other words, you bid on a job. A. Yes.

Q. And then you go to your subcontractors and see if (738) they will do it cheaper than what they quoted, is that right? A. Yes.

Q. If you have no luck, the price goes up. If you have no luck, the price goes down right? A. Right.

(Mr. Liotta) No further questions.

REDIRECT EXAMINATION

By Mr. Bernstein:

Q. You had earlier identified an exhibit as a written proposal by Arthur Vanneri to do the job for \$1,380,000—\$1,440,000. Then you about the fact that the Arthur Vanneri Company reduced its estimate and proposal to \$1,380,000. I show you a document marked for identification as defendant Exhibit 11 and ask if you can identify that. A. This is the later contract I spoke about.

(Defendant Exhibit 11 marker for identification.)

Q. This was the proposal of Vanneri, the Arthur Vanneri Co. to do the job for \$1,380,000? A. This is the one we discussed in the meeting in New York.

Q. Incidentally, Mr. Liotta, quickly—at the tail end of his examination asked you about buying sub- (739) contractors and you explained that meant that you tried to get the subcontractor to do the job for less than you actually estimated in advance he would do it for.

Then Mr. Liotta shot in a question: 'In other words, if he did not then, the job could go up or down?'

Now, if you set a ceiling price for an owner and the sub-contracts came at a higher price, can the job go above that ceiling price? A. No, not as far as we are concerned.

Q. If you make a proposal, you are bound to give them a price not in excess of the proposal? A. Right.

Q. Incidentally, looking at this proposal which is marked for identification Defendant's Exhibit 11, I call your attention to the fact that it refers to plans and specifications prepared by John Hans Graham & Associates, Architects and Engineers, said Plans dated October 23, 1962. Specifications are dated November, 1962. Would you look at the plans and specifications you have on either side of the stand to check with those and see whether those are the same ones? A. In the specifications they are.

Q. May I call your attention to some very small (740) figures here.

May I call your attention to some figures here which have not come out very well in the blue print and photostatic process. Speak out loud now. A. The issuing date is the same date which means that these plans are relatively the same plans. However, there are some slight revisions here which are made by these three triangles, 1, 2 and 3. The revisions call for, No. 1 would be revised if it was 21 December, 1962. So there would have to be revisions made then.

Then No. 2, revised, History of Buildings, it might have something to do with the codes.

No. 3, Contract issued. It has January 7, 1963. So it would indicate that these are relatively the same plans with slight revisions.

Q. As any major construction job goes along, are there minor revisions from time to time by the architect? A. Yes.

(Mr. Bernstein) I offer in now, in addition to the others, this Exhibit No. 11.

(Mr. Liotta) I have not seen it yet, Your Honor.

(Document handed to Mr. Liotta.)

(741) (Mr. Liotta) I object to it for the reasons heretofore stated.

Further, witness has already testified now that any contemplated remodeling was not to be done by the Arthur Vanneri Company, but Three Crowns.

This is between Arthur Vanneri Company and the subcontractor. I object to it.

(The Court) Your objection is overruled.

No. 11 received in evidence.

(Defendant Exhibit 11 received in evidence.)

By Mr. Bernstein:

Q. Were materials actually delivered to the jobsite, materials to be used by the Vanneri Company, materials delivered to be used in the reconstruction as a modern office building? A. Yes, sir.

Q. What types of material had already been delivered at the time things were called to a grinding halt? A. Windows, and some slight electrical conduit.

Q. What do you mean windows—do you mean— A. The frames.

Q. These were for windows where? A. Going to be put into the building.

(742) (Mr. Bernstein) You may examine.

RECROSS EXAMINATION

By Mr. Liotta:

Q. You got the windows back, did you not? A. I cannot answer that because I was no longer with the company.

(Mr. Liotta) May I have Exhibit 11, please?

By Mr. Liotta:

Q. Exhibit 11 between Arthur Vanneri Company and the defendants here was one in which you dad did not want to enter into, right? A. That is right.

Q. Now, in reference to this exhibit, in paragraph 8, there is also a mention of a certain ADAD Corporation, is there not? A. That is right.

Q. Do you know who the ADAD Corporation stockholders were? A. No. I do not.

Q. What does that paragraph say? A. "The sums received by the owners from ADAD Corporation or by way of mortgage or other loans advanced for the purposes of performance hereof shall be trust funds to be applied solely to the performance of the work called for under this contract.

(743) "Said funds shall be deposited in the Franklin National Bank, Franklin Square, Long Island."

This was injected by our attorney. This whole thing was drawn up by him.

Q. You were not aware of who the stockholders of the ADAD Corporation were, is that right? A. No. I personally was not.

Q. The Exhibit 11, the last contract, when was that made?

Revised proposed contract? A. December, 1962.

(Mr. Liotta) May I have your indulgence a moment? I am sorry to waste time like this.

By Mr. Liotta:

Q. The ADAD Corporation was to furnish the funds for this reconstruction, is that right? A. They were to deposit funds in the bank. I believe the owners had some agreement with them that is probably why my attorney or our attorney made that arrangement.

Q. Would it have concerned you, sir, if you knew that some or all of the defendants are the officers of the ADAD Corporation?

(744) (Mr. Yochelson) Objection.

The most it could mean is that they would be using their own funds.

(The Court) Yes, you ask the witness.

(The Witness) This was, I am sure, just a clause which was put into the contract by our attorneys to protect us so that this money would be in the bank so we would be sure to be paid.

By Mr. Liotta:

Q. One last question: Would it have affected your opinion and your judgment as to possibly entering into an agreement with these owners if you knew that the corporation, furnishing the funds was—the owners here—the defendants here, were the officers and stockholders of that corporation? A. Not as long as they put the money in the bank.

By Mr. Bernstein:

Q. To secure the owners in turn your contract provided a penalty clause for delay and also a performance to bind the general contractor, did it not? A. Yes.

(The Court) Was it ever accepted—was the proposal ever accepted?

(745) (The Witness) The proposal was accepted verbally among a group of individuals who were attorneys representing the owners and attorneys representing ourselves and in the City of New York in Max Greenberg's office. As I said, it was verbally done, verbally confirmed at that time.

But a written proposal was not made up. That is why we went ahead and bought those windows.

(The Court) Now, was it agreed that the Three Crowns or the Vanneri Company would do it?

(The Witness) At that time it was the Arthur Vanneri Company.

(The Court) When did the Three Crowns come into it?

(The Witness) This is a personal thing between my father and myself, because he was never happy about our taking this contract.

(The Court) How about the owners?

(The Witness) They were aware of Three Crowns because I had mentioned that I could bring Three Crowns Enterprises into the picture and save them money.

(The Court) Did Three Crowns ever submit a proposal?

(The Witness) Not in writing, no, sir.

(746) (The Court) And there was never any acceptance by the owners in writing?

(The Witness) No, nothing was ever accepted in writing.

(The Court) Of the proposal?

(The Witness) Of any proposal.

(The Court) The Court understands that you have the blue prints in October of 1962.

(The Witness) Yes.

(The Court) Would you explain to the jury what your procedure is so far as the subcontractors are concerned—do they came in and take off from the blue prints?

(The Witness) Yes, they do.

(The Court) Then they submit a bid?

(The Witness) Yes.

(The Court) How long do they take?

(The Witness) Oh, it has been known to take different amounts of time, but in a job such as this one, thirty days would be sufficient.

(The Court) So then it was in November of 1962?

(The Witness) Yes.

CURT C. MACK

DIRECT EXAMINATION

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(Mr. Liotta) May I make a motion to strike Mr. Vanneri's testimony, in toto, for the main reason of course that it goes to the very essence of my objections as heretofore set forth? Further, he never made an estimate. He or Three Crowns never entered into any kind of an accepted contract.

(748) It is now before the jury a possible compensation for possible frustration of plans that never came into existence.

(The Court) Your motion will be denied.

(In open court.)

• • • • •

(750) Q. And in what business or profession are you engaged? A. My work is predominantly real estate appraisal work and has been almost all of my mature life.

Q. Are you now associated with any other company or are you in business in your own behalf? A. Up to the first day of February—last month I (751) was senior vice president of Frederick W. Behrens, Inc., mortgage bankers, Realtors.

Since that time I have been in practice under the name of Curt C. Mack, Realtor-Appraiser, at 1507 M Street, Northwest, Washington.

Q. How long were you associated with the Behrens Company? A. Nine years.

Q. And did you hold that position, the one you have just described, for all of that nine year period? A. All of that time, yes. My work was devoted there to realty appraisal and to realty research and economics.

Q. Were you in charge of that branch of the Behrens operation? A. Yes. That was my principal activity. I was also director of some of the Behrens' companies and still am.

Q. Prior to coming with Behrens, what work did you do? A. I spent 16 years—fourteen of the sixteen years as assistant commissioner in charge of all of the mortgage underwriting for the Federal Housing Administration nationally, including valuation, mortgage credit, architecture, layout planning, cost estimating, although I do not wish to appear to be thoroughly conversant or professionally (752) competent.

Q. What was your title with Federal Housing? A. Assistant Commissioner-Underwriter.

Q. When did you terminate that position? A. March of 1954.

Q. You had been there some sixteen years? A. Since February of 1938.

Q. Mr. Mack, are you a licensed real estate broker in the District of Columbia? A. Yes, I am, and in Maryland.

Q. Are you a member of any associations; organizations having to do with appraising? A. Yes, sir.

Q. Would you name them, please, or some of them? A. Well, I am a member and past president of the Washington Chapter of the American Institute of Real Estate Appraisers.

Q. Will you let me interrupt you here, and ask you to please tell the Court and members of the jury, what the function of the American Institute of Real Estate Appraisers is. A. The Institute is some thirty years old now. It was organized by men in this field who felt the need for

the (753) creation of bibliography, written technical materials on realty valuation and realty economics.

It is a national organization, and has some rather exacting requirements.

* * * * *

Q. Did you say that you held some office with respect to the local chapter? A. I am past president; yes. I was also for six years (754) a member of the Governing Council and three years ago was Chairman of the Board of Examiners of one phase of the business of the field, namely, multiple housing.

Q. Do you belong to any other associations or organizations related to this profession? A. Yes.

Q. Do you belong to the Washington Board of Realtors? A. Yes.

I am a member of the American Society of Real Estate Appraisers, which is also an appraisal organization. I am a senior member and a past president of that Washington chapter.

Q. Have you ever instructed or taught any appraising? A. Yes.

Q. Where and when? A. For five years I instructed what the Institute calls a Course, Course 1 at American University locally. I have lectured likewise at summer courses at Northwestern, University of Connecticut, Florida University, Louisiana University.

Q. What has been the subject of these lectures? A. They were all related to realty procedures, (755) technical, realty economics, analyses, and the processes by which appraisals are appropriately and properly made.

Q. In what recent years has your proportion of time been devoted to appraising as opposed to any other branch of real estate? A. Practically all of it.

Q. Mr. Mack, have you previously qualified to testify as an expert appraiser in this court? A. I have had that privilege.

Q. Have you done that on more than one occasion? A. Yes.

Q. State whether or not you have testified for the property owner or the government? A. Well, I do not want to engage in semantics. But I do not really testify for anyone. I testify to opinions that I have with regard to the parcel of realty.

I have been employed by both, the government and by corporations and individuals to give testimony.

Q. You have testified that you have been engaged by corporations and individuals. Can you name some of them? A. Oh, yes.

Recently in Your Honor's Court, I testified with respect to an opinion of value relating to some land being taken for Potomac Plaza on Virginia Avenue locally.

(756) That was done by order of the owners.

Previously I testified in this court in the sense of the Washington District Court, in connection with numerous cases during the last eight or nine years with respect to condemnation proceedings and taking by the Redevelopment Land Agency, particularly in the Southwest, although not limited to that.

Appointment by owners, the taking of the approach to the Woodrow Wilson Bridge by the government, where I was employed by the owners. That was in Judge Northrop's court in Baltimore. And many others that do not come to my mind at the moment.

Q. Mr. Mack, when were you engaged by the owners of the property in question here to make an appraisal?

(The Court) Wait. Are you through with the qualifications?

(Mr. Yochelson) No.

(The Witness) Early part of February, 1963.

By Mr. Yochelson:

Q. Subsequent to that date were you engaged by the Government of the United States to render opinions of value of property in this same area? A. Yes, I was.

(757) Q. Was the Government of the United States advised of your previous employment by property owners? A. Yes, it was.

Q. Specifically what property were you engaged by the government to appraise? A. There were about 22 parcels in the Squares 378 and 379, which are the areas being taken for the purpose for which this condemnation action ensues.

Q. In this same square and in an adjoining square, is that true? A. Yes.

(Mr. Yochelson) I submit the witness is qualified.

(Mr. Liotta) I reserve my questions.

(The Court) You may proceed.

By Mr. Yochelson:

Q. Now, after the date of your engagement by the owners, what studies did you make of this area? A. I have been acquainted with this area for many years and have observed the actions of the market with respect to it. By "area," if I may, I should like to say that the areas to which I refer in this instance are that part of the downtown Washington metropolitan area lying (758) north, the north line of Pennsylvania Avenue, west of the West line of sixth Street, Northwest, as far west as 13th and 14th Street, and north to F Street.

To me that is an area in which I believe substantially significant change or activity has been occurring.

Do you wish me to go further with that?

Q. You have touched upon significant, or substantially significant—what do you mean by that? A. Well, through the years, subsequent to May 12, 1958, which was the effective date of the present zoning ordinance sometimes referred

to as the Low Insurance Plan, at that time all of the Washington metropolitan area was rezoned to new definitions and categories, and the C-4 area, which is the area that permits the most intensive use in development of land under the current ordinance for commercial purposes.

Q. Is the property of which we are speaking so zoned?

A. Yes. All of this area is so zoned. That zoning area went as far west as the so-called jagged line out to 17-18 Street.

Since 1958 the bulk of the multistory commercial office building and second floor commercial space was built (759) west of 15th Street, including the buildings that I have appraised and some my company financed, such as the Bender Building on Connecticut Avenue, and others.

The prices at that time, maybe it is not appropriate to mention price, but anyway, there was a great deal of land assembly because almost all of that area was originally subdivided into relatively small portions of acreage or land.

In order to do an economic multi-story office building, larger areas were required, and they were assembled. There was a limited supply of that land west of 15th Street, and a very strong market demand.

As a consequence, prices moved from the middle fifties up to as high as 120, and in one notable case, substantially higher.

About two and a half to three years ago we noted that the demand was still continuing, there was this movement toward this area that I have delineated, which was C-4. There is more C-4 land zoned east of 14th Street than there is west of 14th Street.

Simultaneously, but preceded in movement, so there was a downtown progress plan which was financed locally by Hecht's and others having interest east of 14th Street.

(760) There then began to be an assembly of lands in that general area, 14th to 6th, north of Pennsylvania Avenue, and it was then that the market began to take cognizance

when prices began to firm by reason of assemblies of those parcels.

Q. When you speak of the most intensive use permitted by C-4 zoning, what do you mean by that? A. Well, the various—it varies under the zoning, but in general the provisions are that a height, as in the subject case, of 120 feet building height may be constructed, and that the building may have no more than eight and one half times its gross. I do not mean rentable gross area, but gross area measured from outside dimensions, of square foot area related to the size of the site or land.

There are other provisions, but those the most significant.

Q. Does C-4 have an advantage or not in respect to off-street parking requirements?

Q. Yes, inasmuch as there are no offstreet parking requirements, but under the ordinance, as I understand it—and I am sure my understanding is correct, there may be additional space over and above the 8.5 floor area ratio or FAR if the builders elect, after erection, to add or put in enclosed automobile parking space.

(761) Now, that ratio does not apply below-grade.

There are also some recent introduced provisions including promenades at the first floor level without charge against the FAR. There are some other minors such as penthouses for equipment which was not charged to this FAR.

Q. Now, what was the purpose for which you appraised this property? A. Well, inspecting—I, personally, inspected this property although I previously knew of its existence. In consideration of its location and to me, certain other determining factors including the area, the contour or slope of the land fronting on E Street—

Q. Excuse me. I think, perhaps, you misunderstood my question. What were you seeking to determine by this appraisal? What was your actual ultimate end result? A. The fair market value of the property, as I understood it to be redeveloped.

Q. The fair market value as of what date? A. As of the date of taking, which I believe, if I recall correctly, was January 2 of last year.

Q. The 18th just to refresh your recollection. A. About that time.

Q. What's your definition of fair market value? A. Well, the definition generally accepted and (762) I accept is that price which a buyer, who is fully informed, acting without compulsion, is justified in obtaining. And the price which a seller, who is acting without compulsion, is justified in accepting, both parties being aware of the potential or actual uses to which the property could be put.

And also, assuming that, in the open, free market, the property would be offered for a reasonable time.

Q. Mr. Mack, I noticed that one of the elements of your definition was a consideration of the uses to which a property can be put. What is the significance of usage, in so far as it relates to the fair market value of the property? A. Well, to me, it was not a mental speaking with respect to the element of land. Land has its value by its ability to participate or be a part of the production of income—in this case, commercial property.

If the land is in fact not improved to its highest and best use, that is, its most productive use but is committed to use by a structure that is of such value that it is not justified to remove it, then that land has relation in that case to its highest and best potential use.

However, if it is susceptible of redevelopment, or (763) new improvement, then it can obtain its most productive use and value by being improved to that degree which is the maximum permitted and which the market must substantiate.

Q. Would it be right to say that the highest and best use is that use which could or would yield or return to the owner the maximum in profit? A. That is right, as far as productivity. In this case a monetary flow as distinguished from single family residential property.

Q. Well, now, will you please describe this property as you found it on the time of your examination? A. Well, the property in toto, in my opinion, really considered in toto, consisted of basically two parcels. There was one frontage on E Street, on the south line.

Q. Would it be of any help to you to come to the map and point out what you are speaking about? A. Yes, sir.

I will do it here, if you wish.

Q. Will you do so? Stand right here and point it out. A. (Going to map). Well, in the inspection I found this portion of the tract which is covered in pink but outlined by my pointer to be improved with an eight story—very heavily constructed, brick masonry and structure, obviously previously used as a warehouse by the Merchants Transfer (764) and Storage Company (indicating).

Alongside of it, to the east, contiguously with it, is a parcel of vacant land containing some 13,454 square feet, I believe, slightly irregular in shape this lot here.

Q. What was the frontage and depth of this parking area adjacent to the building? A. Well, the vacant area was 76.5 feet across its front and more than that, as I recall, or approximately that, across its back fronting on this thirty-foot alley.

There were no improvements on this parcel which is identified in this lot 187 and lot 188 and lot 838, which is this little place here, except that there was a small frame house here which was used for parking receipts and collection of money, a cashier's box, and a bituminous pavement on the lot.

The rear of this frontage on E Street I found another structure which covered completely some 7900 square feet identified by these alphabetically numbered lots in this lot 831 which was six stories of similar construction but not quite so heavy. This little lot here—having about 2300 square feet or 2300—2350 square feet, separated (765) from the rest of the parcel of the property was unimproved also and had a bituminous paving or pavement that was used for parking.

Q. Resume the stand, please.

Did you inspect the improvements which you have just described? A. Yes, sir.

I inspected them inside and outside—each floor.

Q. With respect to either building did you note any large cracks? A. None.

Q. Have you since the date of the beginning of these proceedings, returned to the site for a more current inspection to determine the presence of any large cracks. A. I have not been inside of the building because the building was locked up.

I was given permission by arrangement through GSA, very graciously and cooperatively permitted me and sent a man down to open it, and I have not been in the interior of the building since the original inspection, which I recall was made on Feb. 8 of last year.

But with respect to the exterior portions—I looked at them and recently more carefully inspected the outside (766) widths of the walls, because I worked in that area, as I previously noted, for some sixty days doing appraisal work.

I visited the property as late as last Saturday, pursuant to your request that I explore and look at the outside facade of the building with respect to a crack. But the only crack I found was some spoiling, or so I thought—some minor deterioration of brickwork under the first floor concrete sills, of what had been windows but were subsequently closed with brick masonry.

Q. How extensive in size was that spoiling? A. I did not see the inside.

Q. I said how extensive in size? A. Two courses.

Q. What would that be in inches? A. Eight or nine inches.

Q. Did you look particularly at the northeast corner of the building? A. Of the front building or the rear building?

Q. Front. A. Yes, I think I have a picture of it. It was not taken recently, but I have a picture of that part of it.

Q. May I see it, please? A. Yes. It would be the northeast corner.

(767) Q. Let me use the photographs introduced by the United States, please?

Mr. Mack, I show you several photographs which are identified as plaintiff Exhibits 3-A and ask you if you can—from these—see the northeast corner of the building? A. That is the northeast corner.

That is the east wall. The northeast of the front building.

Q. And on 3-B, what appears—what wall? A. That would be the southwest wall of the front building.

Q. And on 3-A, which wall can you see? A. Actually, I can see three walls in this picture, Mr. Yochelson. The rear or west wall of the rear building, and a perspective of the—no, the rear of the south wall of the rear building and a perspective of the west wall of the rear wall of the rear building and a part of the south wall of the front building.

Q. And on any of these photographs are any cracks of any consequence visible A. May I take another look, sir?

Q. Certainly.

(768) Q. Mr. Mack, what, in your judgment, was the highest and best use to which this property could be put on the date of taking? A. In consideration of this building, its type and size, and particularly its location—I am speaking now only of the improvements upon those portions of it to the property—the highest and best use, I saw evidence of its practicability, was if you remodeled it for offices for commercial purposes.

In the first place, that building was sound so far as I could tell, and I inspected it. It was very heavy construc-

tion, a very heavy location and had the benefit of heavy floor-construction.

Q. What is the advantage of heavy floor construction?

A. It lends itself to a diversity of uses especially under modern conditions.

Now so many offices, commercial tenants in upper floors use heavy—like an electronic computer equipment. Sometimes I have found in some structures, even fairly new structures, that there is considerable of an engineering problem in renting to certain desirable tenants who use IBM, 1401 or other type computers that have considerable weight.

(769) Both buildings had heavy construction, as a matter of fact. They had concrete floor slabs. While I am not an engineer, I have had considerable experience with this type, and I would say that those floors above the first floors had probably 150-pound live-load bearing capacity and of course the ground floor had unlimited capacity.

There would have been some necessity for some patching and repairing in those floors but nothing of any consequence.

Q. Is this use a better use than the use for a warehouse or storage space? A. Oh, yes, yes. That building as a warehouse is an anachronism. That is adjacent to the Federal Triangle, and activity that had been going on there successfully indicates that what has happened here has happened in many areas in a growing community. The mutation areas change and best uses change. I think this is an illustration of that.

Q. Mr. Mack, I show you a photograph and ask you if you can identify this. A. Yes, sir. That is a picture, an oblique picture. I do not know the elevation at which it was taken, at the red circle encompasses the subject property and some other properties adjacent.

(770) Q. Is this a true and accurate representation of the area as it now exists or rather, as it existed on January 18, 1963? A. Mr. Yochelson, in this scale, I could not say that this photograph includes everything that existed right on

that date, but generally speaking, it is an expression of fact. I do not see some structures in there that might have been there at the time.

Q. Well, does this give you a true perspective of this site with the Federal Triangle? A. Oh, yes, and the relationship with certain other properties, too.

(Mr. Yochelson) I would like to offer this as Defendant Exhibit 12.

(Mr. Liotta) We object.

The witness, himself testified that there may or may not be buildings there on the date of taking. I submit it is not representative, and I would like an opportunity to inquire on the photograph.

(The Court) All right. We will not accept it at this time without counsel's permission.

By Mr. Yochelson:

Q. What effect does the Federal Triangle have on this site? (771) A. Well, the Federal Triangle in my opinion has and is having and has had a very significant effect upon this portion of the downtown area. In recent years and particularly during the last several years, my opinion has been one of the significant forces or condition which have encouraged redevelopment of the area. There have been other developments in there besides this proposed development, which I think also were influenced, not by the Federal Triangle but also by proximity of the Capital of the United States, the United States Court house, the Federal Courts, and Municipal Courts, and the fact that the site lies between the government and the principal retail commercial street in downtown Washington, namely F Street.

Q. Now, what methods or method did you employ in seeking to arrive at your conclusion of the fair market value of this property? A. Well, I, having established in my mind that the highest and best use of this property would be its redevelopment for office buildings and possibly ground floor retail commercial purposes, I went to my files

where I had accumulated information and also to market reports, market recorded data, and I obtained information—with the best of my recollection, with respect to information of (772) rentals such as was available and could be obtained—the movement of land and prices—and I am speaking now of the date of my appraisal—February 9 of last year. I had a benefit of the copy of the commitment to lease this property.

(Mr. Liotta) May my objection be noted to that testimony with reference to the commitment and lease, for the record.

(The Court) The objection will be overruled.

By Mr. Yochelson:

Q. You say that you were furnished with a copy of the lease, Mr. Mack? A. Yes, which I accepted as valid. I have abstracted or analyzed that lease with respect to the—made comparisons with respect to its terms and—

Q. Excuse me a moment. Would you say those terms represented fair market terms as far as rental and other—

(Mr. Liotta) Objection.

(The Court) Wait just a moment.

Isn't that going further? Do you mean predicated on the lease?

(Mr. Yochelson) Whether or not the rental called for by the lease was a fair rental.

(773) (The Court) You will have to lay the foundation for that question, Mr. Yochelson.

By Mr. Yochelson:

Q. Mr. Mack, have you considered rentals and have you informed yourself as to rentals of other office buildings in the District and in the area particularly? A. Yes. I had that type information before I began to make an analysis of the relationship of the lease, which is a portion of the subject property.

Q. Can you tell us what building rentals you took into consideration?

(Mr. Liotta) Objection. These defendants have been produced—they have produced this lease for indicia instead of highest and best use, according to Your Honor's ruling.

(The Court) Objection overruled.

(The Witness) Yes, I have.

By Mr. Yochelson:

Q. Tell us—

(The Court) Wait just a moment. What type?

Any property comparable to this—where it has been reconverted or was to be reconverted?

(774) (The Witness) Including that, Your Honor.

(The Court) Which properties? So that the jury will understand what you are talking about.

(The Witness) One of the reconverted or remodeled properties which was leased to the same lessee was for instance the Star Building.

By Mr. Yochelson:

Q. The Star Building? A. The Evening Star?

Q. Where is that located? A. 11th and E Avenue.

Q. How far removed from the subject property? A. Two blocks, two and a half squares.

Q. Was that lease a recent lease A. Yes.

Q. How recent? A. According to my record, the Star Building was leased to the United States Government, as of the first of December, 1961, but the effective date, beginning of the lease term, September 6, 1962.

Q. Was the Star Building in your judgment a comparable building to this building we renovated? A. It was comparable, but in my opinion somewhat (775) superior.

Q. Now, Mr. Mack, what other rentals did you consider?
A. May I ask a question? Am I limited to redeveloped buildings?

(The Court) No. The only thing that the Court is concerned with is that the jury understand when you are talking about any other building, whether it is new, whether it had been converted, whether it had been used as an office building, prior to the time it had been converted or whether it was a warehouse or what it was? A. Yes, sir.

By Mr. Yochelson:

Q. May I revert to the Star.

What was the rental under the Star lease?

(Mr. Liotta) Objection.

(The Court) Wait just a moment. The objection is sustained.

You might ask what was the Evening Star Building prior to the time that it was converted.

(The Witness) It was used by the Evening Star Newspaper as a rather outmoded, and antiquated office building, and there were delivery platforms, warehousing, warehousing facilities, storage, and so on.

(776) By Mr. Yochelson:

Q. The bulk of it was not used as a printing plant for the Star? A. There were printing plant machinery and so forth in there, yes.

Q. What was done to this building prior to its rental to the United States?

(Mr. Liotta) Objection. It is irrelevant.

(The Court) You may answer.

(The Witness) Yes. I saw the interior of the work going on within the Star.

As a matter of fact, while I had no part in its negotiation and sale, it was handled by one of my associates in Behrens.

The Star Building, particularly the front portion of it, was completely remodeled inside, even including structural elements which—if I may say so, would in my mind not be necessary in the subject case.

By Mr. Yochelson:

Q. Now, you testified that you considered other rentals in order to reach a conclusion. What other rentals did you consider? A. Well, I was able, if I may say so, to consider (777) the Star Building because I have at least data which I am sure is accurate. I also considered a smaller building which had been converted to an office which was of a much lesser desirable location.

Q. Where is that? A. By lesser desirable, I mean less desirable than the subject property and/or the Star Building. The Inter-Ocean Building at 512—9th Street, Northwest. That building also is under a three year lease with twenty-one year options beginning September 1, 1960.

Q. Were these leased to the United States? A. Yes.

Q. What was that building prior to its lease to the United States? A. I do not believe I recall just what it was used for, Mr. Yochelson. It was one of those 9th Street buildings along there. I do not recall the tenant in it. But it was completely remodeled.

But this building, if I may, I make a point in my analysis, the areas, the size of the buildings is also significant not only in relationship to the location and the area but the size and type of remodeling is significant in rentals.

Q. When you say that it is significant, is it (778) significantly good or bad or what? A. The smaller sized buildings tend to be less economically efficient. Because in all of these buildings, regardless of the total land area on which they are put, they require elements of lobby, foyer, entrance, elevator shafts, stairways, and any, in my opinion, structure upon the site which does not have in excess of some five or six thousand square feet, there comes a very questionable economic test because of the high proportion of public and other non-revenue producing space which is necessary.

Q. Do you consider the depth of the front building, I believe a depth of 187 feet, to be an adverse or a plus factor?

A. Well, perhaps useful depth of a structure of this type is related or as related, to me, is not significant.

It actually relates to the frontage.

Are you speaking of this subject property—the frontage?

Q. Yes, sir. A. The front building is in a T shape, while it has some forty-odd feet at its front, it spreads out, has two wings on it. I think that building utilizes the depth adequately. It also has a thirty foot alley in back of it (779) and that is a highly desirable market condition.

I am aware that under the ordinance, you are not supposed to park back there in the alley, but there may be a little usage against the ordinance.

Q. Did you consider other rentals? A. Yes. I have a substantial volume of what I am quite certain are accurate rentals.

I might say that these rentals, further consideration has to be given with respect to the type of services which are contracted—other than lease contract covenants to be given by the landlord—or tenant.

Some of these government leases, including the subject lease to which I have made reference with respect to the improved portion of this property, there were express provisions in them. The lessee was to supply certain metered type facilities such as gas, water, light, and so on.

So, it could never reach a commercial building.

Q. If you were asked with respect to what these rents are and were, are you prepared to testify with respect to them? A. Yes, I am. I have the one on 15th and 12th and E and many of them—

(780) Q. Did you consider 12th and E a comparable location? A. No, I think 12th and E Street is somewhat superior to this location. 12th and E is a corner, has good prominence, I really believe that the Smith building there

utilizes that land to its highest and best use. I think it is somewhat superior to the subject site.

Q. All right.

Based upon your study of other rentals for remodeled buildings, rented to the government and others, have you reached a conclusion as to whether or not the rental provided for in the government lease, on 920 E Street, was or was not a fair market rental? A. Yes.

(Mr. Liotta) Objection.

(The Court) Wait a minute.

Now, the introduction of the lease, Mr. Yochelson— you agree is solely for the purpose of the highest and best use.

(Mr. Yochelson) Yes. Then why do we have—

(The Court) Why this question?

Can't he just testify as to his knowledge of what the building—

(781) (Mr. Yochelson) All right.

By Mr. Yochelson:

Q. Did you also, in reaching your conclusion of value, consider sales of land? A. Yes.

Q. Which in your judgment, if any, afforded you most assistance? A. I am sure that my thinking was, that actually the most significant comparison of land—and I am speaking now of course, of C-4 land—was the closest sale, a sale of the closest land of this type by me. I would say that I had sales, many parcels, adjacent to this property. The property comprised of anywhere from 2500 to 4,000 more or less square feet. Some of them had old buildings on them, which I rejected because in my opinion they were not suitable for development with their maximum potential under C-4 zoning.

Q. Even though they were not susceptible of such development, do you feel that they are an aid to you in coming to a conclusion of value? A. I rejected them. They were not comparable in my opinion.

(782) I have given you a negative answer and I apologize. I thought the most significant sale on the northwestern corner of 11th and—

Q. And E Street? A. Yes.—11th and E. Actually that was the corner of 12th and E.

12th and E, 1201 E, yes, sir. Two and a half blocks west of the subject property.

Q. I think we have in previous testimony from witnesses who have preceded you on the stand obtained most of the details. But would you give us the summary of this sale?

A. In round figures my records indicate that it probably would have sold for 65 or 75 dollars a square foot.

Q. The date of that sale, sir? A. The 23rd of December, 1962.

Q. How can you relate that sale to the subject property?

A. I have already mentioned that in my opinion that corner was superior to the subject property.

Q. Are you prepared to testify to what degree or to what extent it was superior? A. Yes, sir.

Q. Do so. (783) A. I think it is about 20 per cent better than it.

Q. Would that give—what are the factors that enhances value 20 per cent over the subject property? A. Well, it is corner property, at the intersection of two good corner streets. With reference to height, both had 110 permissive height. I thought the first floor was for commercial purposes particularly. It was for a better spot than the location of the subject property. Now, the east to which I referred, included the 11th floor. The first floor was left open and then was subsequently relet to the Drug Fair.

I obtained the rental rates desired from the manager. I do not know the terms of the lease, itself.

Q. You have testified this was in your judgment the most significant sale. What other sales did you consider?

A. I tried to hold my consideration, if I may say so, to similarity permissives, or greater. I testified that one of

the height limitations was 110 feet or the equivalent of 11 stories, generally. But that is not quite true with respect to all of these properties because there is an old provision, I believe of the ordinance, which (784) limits it to the width of the abutting right of way of the street, plus 50 feet; some of the streets below F Street and not at the Federal Triangle do not have sufficient width, to which is added fifty feet to meet the 110 per foot.

Q. You must be on at least a 90 per cent footage to give you the rest of your percentage. A. Yes. D Street is less also and E Street, both. I was advised to give serious consideration to the sale of the Raleigh Hotel which has been revised and located—

Q. Where was that situated? A. Northeast corner of the Avenue, the northeast corner.

Q. What street? A. 12th and Pennsylvania.

Q. Would the fact that the property is on Pennsylvania Avenue make it incomparable to this site?

(Mr. Liotta) I object to counsel leading the witness.

(The Court) Counsel can rephrase the question.

By Mr. Yochelson:

Q. You have heard the question. What is the effect, if any, of this property being on Pennsylvania Avenue (785) in so far as making it comparable or not? A. Well, all of these properties within this area, which in my opinion, constitutes the significant area under consideration, that of sufficient price for economic development or redevelopment, my opinion would be considered to that degree as comparables. The properties fronting on Pennsylvania Avenue are again under the "exceptions" (or provisions) of a better chance for permissive height which properties which do not front on Pennsylvania Avenue, do not have. You could go higher than 110 feet if you had frontage such as the Raleigh had.

The principal frontage of the 27,000 feet constituting the Raleigh land site, I at that time considered it as a land

although I was not there to be solicited whether the building would be demolished or considered—

Q. Why did you consider it primarily as land sale? A. I thought the old building was so obsolete it would do better to take it off and rehabilitate it, especially since you do get that extra site under the ordinance.

Q. What was the sale date? A. Raleigh sale was made in February, 1962, according to my records.

Q. How many square feet are involved in the Raleigh sale? (786) A. About 27,000 square feet, most of which fronts on 12th Street.

Q. Did you, in your judgment consider the sale a comparable one? A. Sufficiently comparable to be suitable, I think, for consideration with respect to the valuation of the subject property.

Q. What was the per square foot of this sale?

(Mr. Liotta) Objection.

(The Court) On the basis of what?

(Mr. Liotta) On the basis that it is not competent, Your Honor.

(The Court) That is for the jury. The jury understands.

(The Court) All right. Answer it.

(The Witness) Well, there were some other consolidations and conveyances of interest. But in the final analysis, then, on the basis of the data which I have which I think is valid, it would be at the cost of about \$100 per square foot.

By Mr. Yochelson:

Q. Did you or did you not take into consideration or (787) or did you have knowledge of any sales on 9th Street going north of F? A. Yes, there have been some sales on 9th Street. I called it the Rialto Theater on the east side, which was sold and the building they demolished and the parking lot—

Q. Do you consider that as a comparable sale? A. No, I do think it is completely out of the influence as between F and the Federal Triangle. Anyway, 9th Street—the street, itself, with the exception of that remodeled Inter-Ocean Building in the 500 block to which I made reference, which 9th Street does not recognize—there is no activity in the market to indicate any specific or immediate—

Q. Does the use of 9th Street for its present purposes tend to affect its value? A. Yes, but I do not believe that is a significant factor because there was an indication of market trend or movement or redevelopment on 9th Street. The present use of it would have little significance. It would have to be assembled and reassembled. But there is no 9th Street nor F Street.

There was another sale,—the southwest corner of 9th and G place, originally know as Grant place.

(788) It is a parking lot.

Q. Did you consider that a comparable sale? A. No.

Q. Why? A. Those lands are still selling at fractional prices of what the market is that we have been interested in on the south of F Street.

Q. All right. A. Permit me. There is some evidence of a small parcel reuse for furniture installations on 7th Street at this time.

Q. Did you consider any other sales comparable which you think might be helpful to the Court and to the jury. A. Oh, yes. I have sales in that area going back a good many years, with the records and data on sales.

As I say, most of them involve relatively few small parcels. There had been some assembly, in Square 378, particular on H Street. I talked to one man who had bought an assembled property there, Mr. Herrmann—I have been engaged by him in other matters in other areas—to make appraisals. I think one thing that I would have to mention in connection with your question about comparables (789) is that the actual recorded sale price of these parcels,

as a rule do not really indicate the ultimate cost of the land for redevelopment purposes. All of these portions, practically all of them are encumbered with obsolete and heavily constructed structures above them. When you are about to assemble, it means a problem. It is no longer a matter of whether it is clear or salvageable now. So costs are very substantial.

So, the actual cost to buyers or purchasers would be land for re-use or something in excess of the quoted price.

Q. Now, are you familiar with the sale from the Merchants Storage to the present owners of the subject property? A. Yes, I have heard it mentioned. I was not completely interested in it because I was appraising the property on the basis of what I considered to be its useful life in consideration of the lease contract and from people in the neighborhood I had no particular concern of what you paid for it, whether it was too much, too little or what.

Q. I take it, if it did not, it would not influence your ultimate value? A. At the time I made my notes, I do not believe I knew exactly what happened. It had no influence on me either way.

(790) Q. Now, please tell us what you finally concluded the subject property was worth, and tell us how you arrived at that conclusion of value. A. Are you referring to the entire property?

Q. Yes, the entire property. If it would be helpful to you, you may break it down.

(The Court) Before you begin, we will take a few minutes.

(Short recess.)

By Mr. Yochelson:

Q. Before you answer the question last given to you, let me interrupt and ask if when you reached your conclusion of value, you had had prior knowledge of the existence of a sale lease-back between the owners of the property and the Woodmen of the World?

(Mr. Liotta) Objection.

(The Court) Overruled.

(The Witness) Yes, I did.

By Mr. Yochelson:

Q. Did you know its terms? A. I considered it significant.

Q. Will you please testify as to your actual ultimate conclusion of value and in as clear a manner as (791) you can, tell the Court and jury how you reached that conclusion.

A. In approaching the valuation of this property, I was aware of its relative magnitude. As a matter of fact, this total parcel encompasses about 20 per cent of the total area of the two squares here involved.

In the appraisal I considered it in fact as actually the price of two parcels: One parcel being the 8-story structure, with the land underlying it at the property, and in conjunction and as part of that front portion, the rectangular six-story building at the rear, and the land upon which it is situated.

The reason that I considered that as an appropriate approach, in considering it as a parcel, was the fact that I had been supplied with the engineering drawings, plans and survey made by the architect, Mr. John Hans Graham, registered architect, which indicated clearly—I might say, though, I was not going—I was wanting to accept those plans because they had the acceptance marks of the building commissioner, engineering department of the District of Columbia, as approved.

With the connectors, the passageway, which are set forth on the plans, again which had been approved, the two buildings, the front and the rear structures were in fact tied together and usable as one parcel.

(792) Q. I show you plat lettered "A-12" of the plans which have been admitted in evidence and I ask you if you can point out on these plans the connector to which you now refer. A. I think they are shown better on a later sheet.

Q. Do you want to take them, Mr. Mack?

(The Court) Put them right up there if you want to.

(The Witness) Thank you.

Well, firstly, right on the plat plan, the connector is shown in the dotted lines connecting. But it does not at this point show any elevation.

Q. Now, on the plat plan there appears two buildings, one lettered "A" and one lettered "B". Which are they?

A. The A building was the front building; the one fronting on E. The B building is the one that was behind it. South of there across an alley thirty feet wide.

Q. Point out where the connector exists on this plan.

A. Well, as it is shown on the plan, the connector is indicated here. But it only shows the connection. Whereas plans indicated to me that that connection was to exist at each floor level above the first floor, giving about a fifteen foot elevation clearance to the thirty-foot alley beneath it.

(793) Q. Suppose you look for them. A. The elevations would show it.

Q. Look for them. A. Here it is shown again, similarly to the one on the front page, but only as a connector and not an elevation.

That would be on here, on A-2.

Here it is:

"Provide doors at each end of bridge; doors and stairs, steps—different elevations than—that indicates there are other elevations but does not show them.

Q. Proceed. A. Here is an elevation which clearly shows—

Q. That is A-12 to which I first referred, is it not? A. Did you—I missed that.

That shows the connectors at each floor level to the rear building, five floors.

Q. Shows them to be made of what material? A. Well, the enclosures on the sides here are identified as aluminum curtain walls. I am sure they have steel girders and structural elements in them. There are some other indications of that in the specifications.

Q. What, in your judgment, was the effect of these connectors? A. Well, the improved plan, the whole plan was (794) designed around both buildings. They were put together. They were assembled into a single office building type, loose design.

Q. Proceed. A. My approach to the appraisal of the total property considered those portions of it as a separate parcel of improved land, and considered them as completed under the design of Mr. John Hans Graham.

(Mr. Liotta) Objection. This again, I respectfully submit, goes to the basis of my objection before in reference to an office building that is not in existence being used as an indicia of value.

(The Court) Overruled.

(The Witness) That was my customary approach in connection with any valuation of property which is proposed to be constructed or reconstructed.

As I previously testified, I was aware that after the commitment to lease had been executed, the property as I have also mentioned to you, Mr. Yochelson, was sold, so to speak, in the market subject to and subsequent to completion of the redevelopment as set forth on the approved plans.

By Mr. Yochelson:

(795) Q. You are referring to what when you refer to a sale? A. I refer to the copy I had of a commitment of sale subsequent to completion of the improvements.

Q. To whom? A. To the Woodmen of the World, of Nebraska. But I was also aware that that commitment to sell in my opinion—I was aware of the details of it, but that commitment to sell did not in fact completely convey

all of the realty when completed, under the proposed design and the lease contract, be incorporated in the property.

There was what is technically and properly called a leaseback.

Q. What would be or what was the effect of the leaseback?

A. Well, to me it had a significant effect. I did not feel obliged or bound by that sale contract, but with all other appraisal material it is part of the significant data.

The leaseback was that, upon the sale of the fee to the property including the proposed improvements, that the grantor, the vendors, the sellers would have the privilege and the contract of leasing back the property for a certain stipulated annual rental payments.

(796) It also reserved certain essential mechanical equipment which had to be installed in the building in order to make it rentable, including—as I recall—elevators, main air conditioning, and one or two other items.

Q. Will you refer to your copy of the sales leaseback for more definite recollection as to what was in fact reserved.

(Mr. Liotta) To preserve the record, may my objection run to all of Mr. Mack's testimony from here on in?

(The Court) Yes. I wonder if you gentlemen would come up here?

(At the Bench.)

(797) (The Court) The Court understands that Mr. Mack made the appraisal in February of 1963.

(Mr. Bernstein) He was retained in 1963.

(The Court) He told the jury he made his appraisal then.

(Mr. Bernstein) He was retained. He made it subsequently. I think within a matter of a couple of months.

(Mr. Liotta) That is not what I heard.

(The Court) No, all right.

The actual appraisal—

(Mr. Yochelson) The actual appraisal was dated April 8, 1963.

(The Court) Then when was the lease entered into?

(Mr. Liotta) August 8, 1962.

(Mr. Bernstein) Prior, because the lease and sale lease-back were subsequent to that but prior to the condemnation.

(The Court) All right.

(In open court.)

(798) By Mr. Yochelson:

Q. You were stating— A. Mr. Yochelson, pursuant to your question, my recollection is—I see what is correct. Because under subparagraph C, on page 2 of this copy, it says—among other things, that the lease may contain a provision that will permit the lessee as seller to retain ownership of certain improvements such as elevators, air conditions, and other equipment mutually agreed upon.”

It goes on to say that he shall not hypothecate or borrow against it and that it is to remain in the property.

By Mr. Yochelson:

Q. What is the significance of the retention of ownership by the seller of the elevators, air conditioners, and so on?

A. I construed that as a tax motivation and gave it no consideration whatsoever. That equipment was in there and had to stay in there in order to make this property rentable. It was an agreement between a buyer and seller and lessee and I gave it no weight in my approach to valuation.

Q. Will you please go ahead and do as I requested and—

A. The only real significance to me with regard to this contract of sale was the rate of return—the percentage (799) of annual return to the purchaser in relation to the consideration of a sale. That was significant in that I was convinced that both of the parties to this negotiation were thoroughly competent, informed people and if I may

say so, parenthetically, in properties of these magnitudes or of these types we do not hire amateurs and novices. We find men of competence and capital resources and knowledge and ability. So, actually that contract of sale, since in my opinion it did not convey the entire property but gave a leaseback for 25 years, renewable for fifteen years at a time of almost in to what was equivalent to perpetuity, was not to me significant except for that one purpose.

In considering the capitalization rate which I will mention—

Q. Is this the method that you relied upon? A. It is one of the significant ones. This property is an income-producing property, since it is the—it gets its value from the ability to put money into the hands of the owners. By way of expressing the value of that income, we convert estimated income into a capital value.

Q. If a purchaser were to determine its value on the date of taking, what method would be most reliable to him? A. Well, if you are speaking of the type of informed purchaser—the first question we find is what is the cash throw (800) off in the market?

The generally accepted meaning of that term is how much money will that produce for me after all of the expenses and costs of ownership are defrayed? That pretty largely determines what value and/or price of the property would be.

However, I am constrained to say that sometimes purchasers have different motivations and will take a different percentage of yield. We go by the general market, however, as we find it.

Q. Is there such a thing as a general market in this field? A. Yes, there is.

Q. Is it a well-defined one? A. Reasonably well defined.

Q. Now, proceed. A. The rate, including what is referred to as the overall rate, that is the rate of return of money and recapture of capital in this transaction, was 7.74 per cent, almost $7\frac{3}{4}$ per cent.

However, I must say, since you have asked me, the procedures that I used, that I considered that that 7.74 rate was a relatively low rate because of this leaseback.

The amount of money required by the lessee to be (801) paid to these new owners, these purchasers, was—after my projection of income based on the government lease less expenses, which I was able to project and compute—that indicated a cash throwoff or excess income over and above that which was contracted as a requirement to be paid to the purchasers.

Therefore, there was an element of risk to it, to the total estimated net income, which was not present in the purchasers because there was to me substantial difference, approximately \$56,000 a year that this building could produce over and above what was required to be paid to the purchaser.

That was where the risk lies.

Q. I see.

In this substantial difference of some \$56,000, that would belong to whom, then? A. The lessee.

Q. The people who had sold the property and leased it back. A. Yes, as distinguished from the occupant-lessee. It had no excess—no connection.

Q. Would it therefore be fair to say that upon the consummation of this sale, the vendors would receive the consideration called for and in addition, an income of some (802) \$56,000 annually?

(Mr. Liotta) Objection.

(The Court) Overruled.

(The Witness) Yes, sir. I presume so. My approach was the value of the property in toto. By "property" I mean the improved property, regardless of who had divergent or various portions of interest in this property.

I was trying to find in my mind what this improved property was worth, regardless of who had what interest in it under certain subsidiary contracts or agreements.

Q. Would you do that? Tell us about that. A. In order to make an approach that I thought was most competent and appropriate, I considered that these structures were the front and the back, considered as a single property by reason of plans, did not in fact, develop this land to its maximum permissible use.

Q. Let me interrupt you and see if we can explain that a bit. Why do you say that even when completed, this would not be the maximum use for this land? A. Well, the plans clearly did not provide for any exterior extensions—any extensions of the area of either of the structures, and neither of the structures under C-4 (803) —and E Street is one of the streets that would permit 110 foot height because it has sufficient right-of-way—but since the buildings were joined together as one, I assumed that it would also be applicable to the rear portion of the building, so to speak. But these buildings are eight and six stories high.

Now, I made that computation for only the purpose of a land estimate.

As I have said previously, the thing that makes this property valuable is its ability to produce an income to its owners.

Q. And this income was not the highest income, therefore you depreciated the land; is that true? A. Well, the income I thought—I am speaking of the government lease now—I thought was fair and equitable in view of what was being demised, of what was being leased here.

But my estimates that have just been testified to were made for the purpose of arriving at a fair proportionate land value under that structure, those two joined together. That was the sole purpose of it.

Q. Now, did you arrive at such a value? A. I did.

(804) Q. What was the value? A. You are speaking of land only, sir?

Q. Yes.

(Mr. Liotta) May my objection be noted for the record?

(The Court) Yes.

(The Witness) Well, the front portion, the 8 story portion situated on lots 817, 818—I beg your pardon.

Q. Would that be lot 48? A. Lot 48. My mistake.

That lot contained a total of 11,437 square feet according to the land survey. That is the front building occupancy.

The lot was 100 per cent covered by the structure.

Relating that area to the maximum permissive FAR area of 8.5—

(Mr. Liotta) Object to this. I respectfully submit the witness is now going to an FAR of 8.5 over the land, rather than what was actually in existence at the time. I submit it is irrelevant.

(The Court) Well, the Court does not follow the witness. The question was asked, "What do you value the land at, Mr. Mack.

(805) (The Witness) Very well. I beg the Court's pardon. I was talking too much about how I arrived at that value. I will answer the question.

In other words, this land to the front is not developed to its maximum permissive use and I made a pro rata adjustment on my basic maximum value to arrive at the value of this particular piece of land in the amount of—I beg the Court's pardon. I will find it in a minute.

The front portion of the land, \$55.32 a square foot. 11,437 square feet, \$663,768, under the front portion of the structure.

By Mr. Yochelson:

Q. Did you in like manner come to a value in your judgment of the land under the rear structure. A. Yes, sir.

Q. Will you please tell the Court and jury what that value is? A. This land under C-4 assumption is developed

to a lesser degree than the front, because it has six stories, against a potential 11-stories under the C-4 permissive.

The structure is going to be maintained, or retained. \$41.14 a square foot, 7900 square feet, fully covered by the portion of the property at the rear: \$325,006.

(806) Q. Excuse me, sir.

Does that include the small alley lot, Lot 50? A. No, sir. That alley lot, however, was included in the lease to the government and I gave it a special value. That was not a part of the portion of the total property.

Q. So that the total of the land value you used in capitalizing was the sum of the two figures you have given us for the front and for the back? A. Only for those portions of the land encumbered with improvements.

Q. The government lease—did or did not include lots 817 and 818 facing on E Street? A. On May 26, they did not. That was vacant and no reference was made either in the lease or in the sale to the Woodmen of the World.

Q. Very well.

Your first step then in determining a value by the capitalization method was to reach a value of the land? A. That was one of the methods.

Q. What did you then do, sir? A. Sir?

Q. What did you next do? A. That was one of the methods.

(807) Q. Incidentally, do you have the total of the land value? A. Yes, I do. In actual dollars by computation, not rounded, \$988,774.

Now, I made a further test of that estimate, Mr. Yochelson.

Q. How did you do that? A. Because I am aware with respect to office building construction in the downtown proportionate area. In new properties and in some degree redeveloped properties, but particularly in new, I considered

this after the redevelopment to be tantamount to new, of the cost of C-4 land; In buildings which, in our land, are economically sound, that is to say, they are in areas and of shapes of land which make them practicable and economic, the cost per square land of rentable office space—

(Mr. Liotta) I object to this type of answer. Now, we are going to something in which there are no sales or anything before the Court or Jury. It is impossible for me to enter a proper objection. He may be in Northwest Washington, he could be anywhere in the country.

(808) What he is basing this opinion on right now—and I object to it.

(Mr. Yochelson) If the Court please, Mr. Mack simply says that he used this as a test, simply to determine the validity of the conclusion already reached. He is not going to change or alter it at all. He has already given us his conclusion. He is simply saying that there is a test, a standard to which informed men may turn.

(The Court) Objection overruled.

(The Witness) I applied that test because I had already made an analysis of the rentable area of the proposed property as redeveloped and remodeled. I came to a figure per square foot rentable. I might say that this also would discount any degree of inefficiency.

It would merely show a variation. At \$9 a square foot of rentable square foot area.

By Mr. Yochelson:

Q. Is this a recognized standard? A. As an appraisal approach?

Q. Yes. A. I do not know that I could dignify it as a recognized standard. It is one of the approaches that I used to test my conclusions with.

(809) Q. Do other appraisers use such—

(Mr. Liotta) Objection.

(Mr. Yochelson) I think he knows what other appraisers do.

(The Witness) Yes, I have even talked with them.

By Mr. Yochelson:

Q. Go ahead. A. \$9 per square foot for rental space in this proposed redevelopment structure, I thought it was in the ball park, so to speak. Mr. Liotta is right, my bearings—my criteria—I did use the cost of structures west of 15th Street, east of 15th Street.

Q. Does this substantiate the land value you have employed here? A. It was one of the things, one of the items, one of the data that confirmed my estimate.

I have others such as the fact that any successful office building in my opinion, under the conditions that occurred a year ago, assuming that market is there, I have satisfied myself that any piece of land is worth \$60 a foot that is suitable.

Q. Very well. Now, having reached a conclusion of value (810) for the underlying land, what did you next do in reaching the actual ultimate conclusion of total value? A. I approached valuation on the basis as previously testified, of a conversion of what I consider to be a respectable net income, and then converted that into an opinion of capitalized value, as if the property had been completed and according to the plans and specifications.

Q. Very well. Tell us how you were able to employ this method in reaching your conclusion and what the conclusion was. A. Do you want it in minutiae—want it item by item?

Q. I think you should give them to us, sir. A. Well, referring now specifically to the improvements consisting of the connected eight and six story office buildings situated on lots 48, 831, E, F, G, H, I and K, in Square 378.

Based on the executed lease, that is the commitment to lease to the United States Government for a five year lease term, provided for payment of \$388,000 per annum. I believe it was \$388,920.20 or something like that.

The indications were that according to the general (811) services computation of square foot rentable area for 103,000 square feet; at the reserve rent that would have been equivalent to \$3.77 per square foot rental per annum, on the face of it, that seems like a low, inordinately low figure.

However, the lease also provided the government would pay for metered utilities, or he referred to that in passing, that included the electric, air conditioning, power, elevator, heat, gas, water.

For my own purposes and information and records, and data and the comparisons made available through what we call building owners and managers, public office buildings and managers, I valued for this information those additional utilities which the government is obliged to provide and which would have to be provided by the lessor if he were releasing it to diverse multiple private tenants, the value of the equivalent of 42 cents per square foot which just for my own purposes, brought me up to an all-utility equivalent of about \$4.20 or \$4.19, which still seemed to me to be equitable but a little on the low side.

But also considered that this tenant was taking the entire property and was entitled to some consideration.

Having already estimated land value, I began to set up what I believed were reasonable expectable costs to be incurred by the lessor—owner, to be paid out of (812) those 389,000.

Do you wish me to go into each item?

Q. Yes. A. Well, the cost of management. In the sense of collections, auditing, accounts, tax returns—speaking from the owner's standpoint, was relatively low in connection with the building occupied by a single tenant, especially a tenant like the United States Government who pays its rent. I charged against this gross income some two and a half per cent, \$9725 therefore. I made a tax estimate—I will interrupt myself.

I said before I could make what I thought was a reason-

ably fair, a valid estimate of the tax burden in money per annum against this property. I was obliged to make some other computations which led me to believe that this property would be assessed at a million and a half after completion, at the rate of \$2.50 a hundred, so I computed the tax assessment of \$37,500 a year. This is talking as if this property were redeveloped, built and occupied by the government.

Now, the owner was obliged under the lease terms to provide char service, janitorial service or daily cleaning. There was some reference to "over-hours" usage. My (813) indications are that a modern clean building, the maintenance would be right around 35 to 37 cents a square foot, based on rentable area.

I charged against the income \$40,700 for janitor services.

With regard to the elevator—the owner-lessor was obliged to maintain the elevator, with the lessee or the government paying the power. The elevator contract for these elevators, I have lost at the moment just how many there are. I think there are six. That was computed at \$5500. That would include replacement where necessary, and the monthly or semi-monthly inspection service.

Similarly, the air conditioning, maintenance only was required by the owner. That includes replacement of filters, lubrication, repair, including the controls, the thermostats and so forth which can be an expensive item of maintenance, at \$2,000. That would be a little high but I am not thinking in terms of the first two or three years but over a long-term period.

Engineer-superintendent, \$5,000 a year.

Maintenance, that is material and labor. By maintenance I mean, cleaning, powder, scrubbing, replacement of broken lights, light bulbs, \$5,000. That figure may vary substantially.

(814) Miscellaneous Supplies—there is a whole range of items which are too numerous and too minute in detail, at \$300.00 a month.

Now, the owner was also—or the lessor was also obliged to redecorate the entire interior. That was at least every three years, under the terms of the lease.

In my opinion, it would cost on a sixteen square foot wall to ceiling basis, would cost about \$14,000 to redecorate the interior of those two buildings, exclusive of storage, that is.

The requirement was in a three-year cycle which, in my opinion, is a practical requirement in accordance with reasonable experience, assuming no abuse of the property, and I am certainly sure the government, as a tenant in the property, would not be abusive.

So, on an annual basis, I set up \$4700 which is third of my estimated costs. Taken from my past experience or recorded experience of the public as set forth in BOMBO and other reports.

The next item that I charged was one that is not included by accountants as a rule, but is in fact and is recognized as an actual cost of ownership and maintenance, even though it is not incurred on an annual or (815) periodic basis, and that is the so-called reserve for replacement.

Mechanical equipment such as air conditioning; plumbing, electrical fixtures, heating and/or roof material, of shorter lives than a physical structural element.

In order to maintain an income flow, this must be maintained in good order and replaced when they become obsolete or physically deteriorated. They have various lives, good equipment.

The equipment is specified in the plans.

Reserve for replacements was broken down by an estimated 20 year basis, and this does not refer to repair but replacement.

The 30 years life of the electrical equipment not including the conduit which has an indeterminate life, but switch boxes, circuit breakers, fuse plates, motors, and so on.

I wrote off the elevators at 25 years and air conditioners in 12 years. We used to write air conditioning off in ten but they have improved. That added up to the equivalent of 7 cents a square foot or \$7,700.

The owner was also obliged to protect his property (816) with so-called hazard insurance, fire and extended coverage.

Based on an 80 per cent company insurance contract, \$2,400,000 which has a minimum fire rate because it is in a heavily protected area and this is a highly resistant frame building, 5.046. Standard coverage .015 extended coverage and all of those added up to .055, and on that three year policy, premium rate on 55 per annum, is obtainable at two and seven tenths times the annual rate of three years. \$1188.

Those items all added up to \$122,613. That is the equivalent of 30.74 per cent of the gross rent contract. That is based on a five-day week. The residual amount of \$266,378—

By Mr. Yochelson:

Q. You have deducted the one hundred twenty-two, six thirteen from your gross amount of \$389,000 and you are left with what figure? A. \$260,387.

Q. What would be the net? A. Well, it is net, but it is net before any recapture of capital or so-called depreciation of the improvements so it provides for the replacement of equipment (817) in items but not for the recapture of the capital investment since real estate is a wasting asset in effect, although slowly, we have to provide for a recapture of investment, otherwise you go broke.

I already testified to the estimated land, on which I projected that land value underlying the improvements, that is all, in the land I was referring to, which was entitled to a six per cent investment yield per annum.

I have seen downtown lands capitalized at a lower rate but I do not believe over the long-term the investment

market is generally willing to accept a lower rate of return on land.

That capitalized rate, as against the land value, resulted in a \$60,728 charge against this gross net yield of \$266,000-odd.

That is the balance of the net income which was attributable to improvements.

Q. What is the balance, sir? A. \$205,659.

Q. How did you capitalize it? A. Well, I have already mentioned that the sale of the property was at a capitalization rate of 7.74 per cent yield.

(818) Now, that is overall, land and the building.

I also stated, if I may have permission to repeat myself to try to answer your question as adequately as I can, that that contract of sale did not represent the total income productivity, even based on the government's lease, and there was a risk of that \$56,000-odd, because that would be the money that would vary, if there was a future variation in rental and/or operating expenses, rentals either down or up, the risk was in that.

But I capitalized the entire income flow because my job as I saw it was to capitalize value of this whole property, regardless of that. So, I capitalized it at a basis of a 45 year expected economic productive life.

Q. This building as remodeled, did you estimate it would have such a life? A. I think it would have a longer physical life. These buildings do not physically die. If they did, we would need redevelopment land agencies. They stay and stay and stay. This building would last, I suppose, several lifetimes, barring war, but neighborhoods change just as this neighborhood changed for the better, in my opinion, and was last year and the year before, and I think (819) it is obligatory to us to evaluate property to take cognizance of that which is rather typical.

Now, the government is not going to change. The Federal Triangle will no doubt stay there and this building will

probably have a long productive life. But it is my projection that, rather than be optimistic, I may have been a little on the careful side.

Q. Using this forty-five year life, how have you capitalized your remaining net income? A. Well, I assumed that this building's career would pretty well follow that which has been pretty well identified as typical, as these buildings get older, two things happen to them as a rule: One, they acquire obsolescence, and they tend to have an increased operating expense. I tried to provide for it in my projections. But they do have a tendency to have an increased operating expense, and that they also tend to become less competitive in the market with other properties, assuming that the market stays good, and you have to make shadings and concessions in rentals.

We have seen that happen and I have seen it in my lifetime as many of you do. So, as a consequence, the (820) method of capitalizing this net income now is sort of assuming that for two-thirds of these forty five years, for some 30 years, this net income will remain constant, but after that, you can call it a declining annuity factor, the net income will tend to diminish either for one or both of the reasons I have mentioned.

Also in applying capitalization rate, since I was capitalizing the entire estimated net income and not a lower portion of it which was involved in this contract for sale to the Woodmen of the World, I applied a higher capitalization rate, a half of one per cent higher, or $8\frac{1}{4}$.

Now, actually, mathematically, an $8\frac{1}{4}$ per cent rate applicable to the entire net income is about three per cent applied to that highest hazardous lease-back income, quite a penalty. In my opinion, I think it is appropriate in the market to recognize that and the market recognizes that.

The market does not capitalize leaseback income at as low a rate as, for instance, say, a mortgage rate or a rate of 7.74 such as I saw here.

That gave me—I am always talking about the completed

improved building, occupied by the government (821-22) in this case—a resultant.

By the way the capitalization factor of that is 12.02 which, converted the equivalent not to $8\frac{1}{4}$ but 8.33. That is the inverse of it.

Q. What do you mean by the factor? Is this a figure you have to multiply the net rent by to reach the value? A. Yes. When you do that, you assume a 45 year life, and $8\frac{1}{4}$ per cent return on the amount of undepreciated capital remaining from year to year unrecaptured, at that rate, $3\frac{1}{4}$.

In that way, we discount probable errors in estimated future.

Q. Using that factor, what value do you reach? A. Mathematical result of that applied to that 205,659 is \$2,492,836.

Q. That represents what? A. Capitalized value of the income from the lease attributable to the improvements as remodeled and rebuilt.

Now, this may sound theoretical but it is actual, factual market return.

Q. In order to get to the value of the entirety, then—

(The Court) Wait just a moment. That is for the (823) jury to determine.

That is why they are here.

(The Witness) I am sorry. I thought I was lecturing, Your Honor.

By Mr. Yochelson:

Q. In order to get to the total value of land in the building, what do you do? A. Since we have already provided for a return on the land, I added the land value to the capitalized value of the improvements, namely, 1,012,000.34 which brought me to a figure rounded of \$3,505,000.

Q. That represents what? A. That is in my opinion the

value of the property improved now, with structures, as brought up to the condition recited on the plans and specifications.

I might say that overall capitalization rate, related to the gross rent or reserve of the government lease against this capitalized value of this portion of the property relates to 11.2 per cent gross.

Q. Is that high, low or accepted? A. It probably may be a little bit on the high side.

Q. Now, your value then is roughly three million four, or three million five. Three million five hundred four, from (824) which you must deduct the cost of improvements. A. Well, my value actually is \$3,505,000, yes, sir. I have deducted—I have figured about \$10 a square foot for this development cost. I am aware that the Star Building cost substantially more than that because of the complete redoing of the entire interior which is not necessary here, I mean, structurally.

Q. What figure did you use for the cost of doing the work required to renovate this building? A. \$1,350,000.

Q. This gave you then a resulting value of the land and building under lease to the government of how much? A. Well, on the basis of the improved property, leased under the government's lease terms, less the cost to put it in that condition of \$1,350,000, was \$2,155,000.

I must say that that is definitely and solely predicated on the complete redevelopment of this property according to those plans, substantially in accordance with those plans and specifications.

Q. Now, Mr. Mack, did or did this figure include the value of the adjoining lots 187 and 188? A. No, sir.

Q. Did you come to a conclusion as to the value of those two lots? (825) A. Yes, sir.

Q. What, in your judgment, was the highest and best use of those two lots? A. I was convinced at the time of my appraisal, as I said last February, and seeing what was

occurring there, and projecting reasonably the trend of the area, has already been justified, that there was a continuing market and need for additional office space. That land, comprising some 13,454 square feet more or less, with its frontage of some 76.5 feet, depth to an alley with the contour of the land sloping backward to the alley which gives a break to the building by exposure and basement levels to the rear of the alley, was suitable, of excellent size and suitable shape for a full use of the C-4 permissive office building.

I would have said, however, that it would have been almost necessary, I thought, economically, then to attract the market, that another provision of the C-4 section of the ordinance be used. I have considered that in valuation, namely, the additional 1.0 which is privileged if you include enclosed automobile parking service.

Q. Does that slope towards the alley aid or not in providing automobile parking? (826) A. That is desirable.

Q. Based on your judgment of the highest and best use of this adjoining lot 817 and 818 did you reach a conclusion as to the value of those lots? A. Yes. \$60 a square foot.

Q. Why do you put \$60 a square foot on lots 817 and 818 and a lesser one on lot 48? A. These structures do not include these C-4 zoning lots upon which they are situated, and the land, includes highest and best use. They are eight and six stories. Whereas under C-4 you can build the 1101 E Street.

Q. And have you made the calculation at \$60 per square foot applied to these two lots to reach a total value for the lots. A. Yes.

Q. What is that total value? A. \$807,000.

Q. Having given us then, sir, the segments of value, can you now give us the total fair market value of the entire property? A. As redeveloped?

Q. You did it—

(The Court) Wait a minute.

By Mr. Yochelson:

(827) Q. As of January 18, 1963. Yes, \$2,962,000.

I projected this capitalization on multiple tenancy.

Q. On multiple tenancy projection, would you come to a different conclusion of value? A. Almost exactly the same, but as a higher rent but with the owner supplying all the items following the custom, it is \$9,000 more.

(Mr. Liotta) Object to that. I want to ask that it be stricken. They have been talking about the government lease and now they are going to something else. I submit that it should be stricken.

(The Court) The court understands. You can come up here.

(828) (At the Bench)

(The Court) There is no question in the Court's mind that this witness has predicated his testimony on the lease and the sale.

(Mr. Yochelson) What he is now saying is that he has also computed it on what this building would rent from multiple tenants, not the government. He said he reached the conclusion that it would be almost the same. \$9,000 difference.

(Mr. Liotta) All during the course of this case they have been attempting to—or they did get in evidence the indicia of value of the government lease.

(The Court) Not as strong as right now. This is the witness, because Kolb very definitely stated in his testimony he only used the lease and the sale to check his own figures, that he did not base his opinion.

Now, Mr. Mack, time and time again has reiterated that he has based his opinion on the lease and on the sale.

(Mr. Bernstein) I know.

(The Court) It is difficult for the Court to understand why he would come in here and testify in view of the fact

that it is conceded by (829) all parties that the lease and the sale are introduced solely for highest and best use.

(Mr. Yochelson) He is now testifying and Mr. Liotta is objecting to it.

(The Court) Yes. The objection is to be overruled, because that is what he should have started off with or at least used it as a basis.

(Mr. Liotta) On that basis, also, while we are here, I would like to move to strike all of his testimony.

(The Court) The Court is not going to strike the testimony. Are you going to ask him any more questions on this?

(Mr. Yochelson) I was just going to revert back to one other question, as to the rental value of this property for storage and warehouse.

This was another element that the government testified to with respect to it.

(Mr. Liotta) That had nothing to do with its highest and best use.

(Mr. Bernstein) You have got witnesses to rebut with.

(Mr. Yochelson) This is the reason I wanted it.
(830) They said forty and forty-five cents a foot.

* * * * *

(831) By Mr. Yochelson:

Q. Mr. Mack, you were beginning to testify that you had reached a conclusion of value on the capital or retentive capital basis giving or using rather multiple tenancy, right?
A. Yes.

Q. Without going to the same process that you gave initially, will you simply state what, in your judgment the total rent would be and the total expenses would be in the net? A. Yes, sir.

Well, that was another test of my valuation and estimates, Mr. Yochelson. With respect to a so-called multiple tenancy,

I gave consideration to a number of factors which I have not testified to here because they were not in order. But with respect to multiple tenancy, I had to take into consideration that due to the connection of the buildings into one homogeneous mass, that individual tenants going into the building from E Street and having as their destination the rear building, get to the first floor of the rear building they would have to go up to the second floor and through that overpass and go down or go in the alley entrance. I depreciated the rental value of that rear area. Also in projecting reasonable (832) estimates, what I considered reasonable, for multiple tenancy, I included vacancy allowance of three per cent, which was not present in the government lease.

Now, the government at the end of five years had vacated, if they had, then this type of approach would become defective.

As long as the government is in there under lease there is no vacancy.

There are one or two other similar items. I felt that the front part of the structure would have a marketable rental value—with all utilities and services supplied by the owner. Tenants do not supply heat and so on. That it would have a somewhat higher per square foot rental area value than the rear building even those levels of the rear building at or above the second floor. There were also other similar considerations. They are buildings in that area, management storage space, shop space, repair space as required. That front part has a subterranean basement which was good for its use so long as nobody lived there.

Those things considered, also, I considered that on the basis of the multiple tenancy, only the actual office enclosure space should be considered as a rentable area.

That is, I believe typical, at least from my experience, it is. As a consequence, I found somewhat less actual rentable space than either the owner or government had computed for their purposes. These things are variable.

To brief it down, pursuant to your request, to \$5 a

foot at the front and \$4.55 at the back, 94,022 square feet at an average, a weighted average of \$4.84 and including all the utilities. This gave you a somewhat different net because of the inclusion of cost of utilities.

(Mr. Yochelson) Start with your gross.

(The Court) Wait—I think we will give the reporter a few minutes rest. We will pick up the subject right from here.

(Short recess.)

By Mr. Yochelson:

Q. Tracing back just a bit, you have given us some factors which you have treated as variances in multiple rentals, such as area and what not, and you gave us an average square foot income of \$4.84 per square foot on the two buildings. A. Yes, sir.

(834) Q. Weighted average means there was more in the front and less in the back. A. Yes.

Q. What was your total then that you estimated would be received from multiple tenancy? A. Gross. Before deduction for estimated vacancy loss, was \$456,813.

Q. Running a bit hurriedly to your other deductions, list them—you had a vacancy loss you said of 3 per cent. A. Yes. That made the long term, \$13,700.

Q. That reduced your gross to how much? A. \$443,109.

Q. What were your estimated expenses without itemizing them. A. I have them. These expenses include charges that were not present, in my previous testimony.

Q. Charges that arise because of the type and character of multiple tenancy? A. Yes.

Q. What are the charges you have felt would be allocable? A. \$169,150.

(835) This left \$273,959.

This is a correlative figure with one I testified to pre-

viously in relation to government lease. It is the money estimated in the form of an income before providing for depreciation.

Q. Now, did you or did you not use the estimated life in determining what your depreciation would be in a multiple tenancy as a government tenancy? A. Not quite. To the life, yes, but I capitalized this income at a slightly higher rate.

Q. Why? A. I think that multiple tenancy operations require a little more attractiveness in the market. The higher the rate, the lower the estimated value, of course. I include more of a cost for management than I did in government, and I capitalized a higher rate because I thought it would take a little better return.

Q. To attract an investor? A. To private capital.

Q. What did you use? A. The government is a good tenant. $8\frac{1}{2}$ I used.

Q. Using it what factor do you get— A. That is the reason I hesitated.

I did not put my factor down here. My recollection is that 8 (836) is that 8.5 on the same declining annuity assumption would be about 124-something, instead of 1212. It would be a higher factor. I beg your pardon. It would be lower.

Q. And what did you reach then as your capitalized value of the building on a multiple tenant basis? A. About two and a half million dollars. Two million five hundred twenty-five thousand and ninety-four dollars.

Q. \$2,500,000 roughly.

Does not that figure include the land on which the improvements are located? A. No. The land value is included at almost the same price. It was a little different because in the government lease as I have mentioned, lot 50, that little isolated 2300 square feet of land which is separated from the rest of it by an alley on both sides, was included in the government lease. But if you are renting

to multiple tenancy, that would remain at the disposal of the landlord, the lessor. It would by measurement accommodate about nine automobile parking spaces. Or it might be conceived to be used for alley printing shop or an alley restaurant, or (837) some other type of use.

It would not be included in this rental as it would the government lease.

Q. What land value did you use on the total in reaching this capitalized value? A. \$988,774.

Q. And therefore, your estimated fair market value by capitalization was a multiple tenancy assumption, how much? A. Rounded figures—\$3,514,000. That is rounded from \$3,538,000.68.

Q. Now, this does not include the adjoining lots 817 and 818. A. No, this is the same property with the exception of lot 50 that was referred to with respect to the government lease.

Q. So that in reaching a conclusion of value as of January 18, 1963, you must remove from this three million five the cost of improvements, must you not? A. Yes, the same cost.

Q. And this brings you down to how much? A. \$2,164,000, before incurring the costs of remodeling, but on the assumption that the (838) building has been remodeled.

Q. In order to get the value of the whole, you add the value of the two lots? A. The same value as previously testified, yes, sir.

Q. And on a multiple tenancy basis then what is your conclusion of the total value? A. I have \$2,164,000, and the \$13,454,000 to which I previously testified. I want to get the exact figure on it—is \$807,000.

Q. That is your estimate of value of lots 817 and 818. A. Yes.

Q. Summarize again what your judgment—fair market value of the property on January 18, 1963 was. A. I based

my estimated value of facts as I saw them, so far as income-productivity, namely, the government lease, rather than the hypothesis of multiple family. Therefore, I had a conclusion of value as of that date, assuming the property to be in rentable condition, less cost of putting it in a rental or rentable condition, at \$2,962,000. That is inclusive of the 13,454 square feet of vacant land fronting on E Street.

Q. Direct your attention to something apart from that which we have just been discussing.

(839) Assuming that the present structures, the front building and the back building, were rented either to a discount house, print shop, or for storage purposes, have you made some study to determine what rent would be expected? A. I am afraid I did not quite comprehend the full extent of your question. Did you say the entire improved property, front and back?

Q. Yes, as they were on January 18, 1963. A. With the possible exception of Mr. Apse's National Printing Company, I have difficulty of thinking about a printing company who would operate in less than 130-odd square feet of space.

Q. A printing company as to the back building only. A. That would be. I would say it would not be the highest and best use of this property—of this area.

Q. But for that use, can you give it? A. But responding to your question: On the assumption that the arrangement would follow the typical arrangement of occupancy of that type tenant which I believe would be permissive under C-4, a tenant typically supplies heat, light and water. If there is increased hazard insurance rating assigned by the Underwriting Bureau (840) for such use—flammable materials and so on—the tenant would normally be required to pay the increase, the difference between the normal risk rating and the increased rating, especially if he had a paint shop or stored paints, or a storage room of paints.

Thirdly, the tenant would be obliged to carry under a lease—it is typical now to include a tax escalator clause,

namely, the tax assessment and real estate tax burdens will be increased above that which is the first year, the tenant would pay the increase.

On those in my opinion typical provisions of that kind of occupancy, I would say that rear building occupancy was worth \$1.00 a square foot at the minimum and if I had the problem of leasing it, I would try to get about ten per cent more.

Q. How about the front building? A. I might make a concession on it—on the fifth and sixth floors. That elevator is there and is operable and was good but it might not permit it.

Q. Tell us in your estimation what you believe the front building would rent for such a discount of upper floor storage? A. Well, I have rentals of smaller buildings in that (841) immediate area of properties of similar type where they have a much smaller property. There are no properties of equivalent size that I know of in that immediate area, but there are some that have retail sales at the first floor and in one instance that I recall on 10th Street, where they also have a finished open basement or sub-level sales area, with storage, I think the three floors above—those rentals, I can give them to you specifically if you want.

They vary widely. They will run from \$2.00 to as high as \$3.50 a square foot with the tenants buying utilities. Now, when they lease the whole building I have never seen a lease which breaks up the floor levels by rentals. Your first floor rental when leased only for retail sales will bring more than that. Except on 9th Street. 9th Street does not have that rental level.

10th Street is the one I am speaking of particularly.

(Mr. Liotta) Is it your intention to continue now, Your Honor?

(The Court) You can start cross.

CROSS EXAMINATION

By Mr. Liotta:

Q. You were asked about the other properties (842) that you appraised in this square for the United States Government. Now, you were requested to appraise those properties by the GSA, were you? A. Yes, sir.

Q. And you also appraised the rear of this property at \$40 a square foot, right? A. Not quite. I think it was somewhat—a little bit higher than that. \$41.40—\$41.14 actually.

Q. Would you say the rear of this property is as good as the property underneath the Houston hotel? A. Oh, I think this property is quite difference. I do not believe that there is any actual comparable property that I appraised or that I know of in the area. The Houston Hotel has a relatively small land area. It is a narrow piece.

Q. It has over 7,000 square feet, has it not? It has between six and seven thousand square feet, does it not? A. I suppose.

Q. Would you like to look at your appraisal that you made to find the Houston Hotel in there? A. I think that was possibly two or three, was it not?

Q. It is your appraisal. You have an index in the front. (843) A. I have it.

Q. Do you have the Houston Hotel? A. Yes.

Q. Tell me where that is in relation to the subject property. A. Right next door to the subject property on the east line of it.

Q. How many square feet in it? A. 6579 square feet.

Q. How many square feet underneath that building in the rear of the subject property? A. 7900.

Q. The rear building? A. Yes.

Q. The size is comparable, is it? A. Yes, within 20 per cent of it.

Q. Except that the Houston Hotel property is on E Street? A. Yes.

Q. How much did you appraise the land in the Houston Hotel for, that you submitted to the United States Government? A. This land was appraised as being comparable to a 12 story building structure, largely obsolete.

(844) Q. Please tell me out of that book, what you appraised the Houston Hotel land for? A. We came out at the \$37.40 a square foot appraisal had no alley frontage, and was almost entirely covered by the building.

Q. How much did you appraise the lots without the improvements on for the defendants in this case, lots 817, 818 and 836? How much was that a square foot? A. You said the numbers fast. Are you talking about the vacant land?

Q. Vacant land, the front land. A. Yes. \$60.

Q. In your appraisal, sir, where you show to the United States Government comparable sales and rentals and comparable land values, is there anywhere in that appraisal you ever showed us the sale of the Merchants Storage and Transfer Company to these defendants? A. No, I did not think it was at all comparable.

Q. You consider other sales in this area in this square? A. Yes, but if I may say so, the Merchants Storage, if that sale had been considered only as vacant land, for land comparable purposes, it would have figured probably about a million eight.

(845) But that by no stretch of the imagination, in my opinion, is the Merchant's Storage property with a 35,000 square foot area, of which approximately 50 per cent is encumbered with those 6 and 8 story building, is comparable with a hotel that does not even have a bath tub in it. That property has value, but it is largely obsolete. That land is dedicated to hotel use. I have given you comparables with hotel use, not only in here but, also in Dallas, Philadelphia, Fort Worth, Houston, or other cities.

Q. You have compared the Houston hotels to the hotel in Houston, Dallas and everywhere else, have you not?

A. As comparative purposes. The sale of the land on Connecticut Avenue to the Hilton, with the beautiful 1200 room hotel was at \$20.40 a square foot.

Q. Are you aware that I am in charge of the District Unit of the Department of Justice handling condemnation in the District of Columbia—are you aware of that? A. I will never forget it.

Q. Let me ask you this. Are you aware that there are a number of other trials coming up after this case, are you aware of that? A. I have inquired of you and I have never gotten (846) an answer. You told me you have settled some. But I have assumed there would be something and that you would not settle them. I do not know whether you are going to try any that I am appraising.

Q. Are you aware that I have not requested any information from you on your appraisals since they were made? A. Oh, no, you have asked me for breakup appraisals and you asked me for an opinion of the current month to month rental value of the Houston Hotel under contract. I think it has not been paid yet, but I am sure it will be. I gave you several months—

Q. Have I asked you to be ready for any pretrials or pretrial conferences? A. No. I am available.

Q. Is there anywhere in that appraisal on any of the properties that you have got in there that you submitted to the United States Government wherein you came up with a \$60 land value? A. Yes.

Q. Which one? A. Milestone's corner. In excess of \$60.

Q. For the lane alone? A. Yes.

Q. On Pennsylvania Avenue? (847) A. Oh, no. I do know any appraisals on Pennsylvania Avenue, as you will remember.

Q. Now, in reference to— A. I may complete that.

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Q. On Pennsylvania Avenue? (847) A. Oh, no. I do know any appraisals on Pennsylvania Avenue, as you will remember.

Q. Now, in reference to— A. I may complete that.

That corner was appraised by me as land with the building totally demolished at \$62.50 per square foot.

Q. Any others? A. There were not any others remotely comparable in my opinion. They were all small pieces.

Q. In reference to the Houston Hotel sale, would you look under your reproduction and tell me what your land value is under that sale and what comparables you used?

A. Here is a sale on hotel site on Connecticut Avenue and Florida Avenue, Northwest. This parcel contains 2254000 square—it is a big piece, 225,000 square feet. Has a different zoning, but for practical purposes, has the same import because they are both hotels in the sense of improvements. Zoning sale equaled \$20.40 a square foot. The hotel was then under construction, not completed, 1200 rooms, banquet halls, and so on. Immensely (848) superior to the Houston Hotel which was built in 1927 and as I say, has 140 rooms, very small.

Q. Are you still referring to the land value? A. Yes, here is another one. I take the position that the valuation of hotel sites, that the hotels are not the local market. Neither are office buildings for that matter.

Q. That is why you went to Dallas, Texas? A. Well, I reached around to see what other sites—what other cities were doing—not only Dallas, Philadelphia, Houston, two in Dallas, and also a comparable under my appraisal of the Plaza which I did have—

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(852) By Mr. Liotta:

Q. Mr. Mack, you were discussing yesterday your making of the appraisals for the United States. When you informed the Department of Justice as to your intent to make the Merchant Storage and Transfer appraisal, you were given full permission to do so, were you not? A. It did not work quite that way chronologically as I recall, Mr. Liotta. I was employed to make an appraisal of the Merchants Transfer and Storage sometime before I was even queried by officers of the General Services Administration with

respect to making other appraisals in the same square and in the adjoining square. At that time I informed GSA that I had been employed by Messrs. Lawrence and Dicker to make an appraisal of the Merchants Storage property. That was my first, as I recall—the first statement pursuant to the inquiry from the government about additional (853) appraisals of properties and squares.

Q. And your inquiry was as to—your statement was as to the fact that you had made this appraisal and no one stopped you from making any for the United States, did they—the United States hired you, did they not? A. Yes. I had not at that time made the appraisal. I was engaged in making it.

Q. With full faith, sir, in your integrity and your fairness as an appraiser, is not that right? A. I would hope so.

Q. Subsequently thereto you did other work; as a matter of fact, you brought one appraisal to date with no change. That was Mr. Didden. A. Yes, I believe that was his name. I tended to think of it as property rather than as a name. It was a property on 10th Street, as I recall.

Q. In other words, Mr. Mack, the government evidences full faith in your ability as an appraiser and your fairness, did they not? A. I have that feeling; yes, sir.

Q. All right, Mr. Mack.

Now, let us get back to the appraisals you made for the United States. Would you like your appraisal (854) book in front of you? A. Well, since you had exhibited that, I brought my own.

Q. You have your own? Fine.

Q. Now, the property known as 920 E Street, owned by Bresch, Incorporated—what was your appraisal of the land—that is your parcel No. 1. Your appraisal of the land? A. No. 1.

(Mr. Yochelson) It might be helpful if you will describe it so we will know what you are talking about.

By Mr. Liotta:

Q. A piece of land containing 4,866 square feet, 920 E Street, formerly owned by Bresch, Inc.

(The Court) 920 E Street.

(Mr. Liotta) Lot 53 and lot 873 in Square 378.

(Mr. Bernstein) B-r-e-s-c-h.

(Mr. Liotta) Yes, lot 53, in 387—in 837. I'm pointing to lot 53 right not (indicating).

By Mr. Liotta:

Q. What did you appraise the land for in that building, sir? A. A figure that I have in my report for land by comparison is 194,640.

(855) Q. How much was that a square foot in your report? A. \$40.00.

Q. \$40.00 a square foot. Now, if you would, just give me directly your answer as to these questions on this so we can save some time. I am looking for the square foot value. Turn your attention to your parcel 2, 924 E Street, N.W., being lot 816 in Square 378. Do you have that before you, sir? A. Yes, I have it.

Q. Now, that is directly next to—adjacent to the subject property, is that right? A. Yes.

Q. All right. Now, in that particular property you attribute all your value to the land. What was your total value per square foot?

(Mr. Bernstein) For how many feet?

(Mr. Liotta) There was 2,350 square feet.

(The Witness) I am sorry.

By Mr. Liotta:

Q. How much was that a square foot? A. I have to say at this point, Mr. Liotta, that I did not attribute all of the value of that property to land by any means. That

property, that land is encumbered (856) with an obsolete three-story building, which damages the value of the land in my opinion. But it is too useful and valuable to be destroyed. To answer the question directly in so far as land value, I said that this land, actually I did not value that land as of this date because I said that I thought that property in toto was able to produce an income stream, as it was at the time of my appraisal, and that it would not be economically feasible to destroy the structure that could produce an income. I capitalized that income and converted to land after some thirty-five years of usefulness of the property in toto.

Q. Take your fifty-four thousand six hundred dollars and divide it by 2,350 square feet. What is the answer?
A. I will have to get my slide rule. 2350 square feet, agreed?

Q. Yes. A. On the basis of that calculation—which was not mine—the value that you are giving me relates to the whole property.

Q. The whole works, building and all—how much? A. Related to land area, about \$23.20 or something like that.

Q. Now, the next property right next door, (857) the Houston Hotel containing 6,579 square feet, you stated yesterday, that you valued that at \$37.40 a square foot; right? A. That was the land valuation. But that was not the means by which I arrived at my estimate of the value of this property.

Q. Would you kindly answer the question? A. I would, gladly, but I want to answer it correctly.

(Mr. Liotta) I submit that the witness should answer the questions put to him rather than give a story on it.

By Mr. Liotta:

Q. What was it on the Houston Hotel—it is lot 835, was it not? What was the value placed on that? A. Lot 835, correct, in square 378.

Q. All right. Now, the next parcel, your parcel 4 was a small piece of land containing 122 square feet which I

will pass by. You valued that at \$50, did you not? A. Yes.

Q. 449—9th Street, lot 820 in Square 378, containing 1,191 square feet; you did the same thing you did with parcel 2.

(858) Your total valuation for this ninth street piece was \$52,700. How much is that per square foot? A. Are you speaking of the corner of 9th?

Q. That is the corner of 9th and E Street—right on the corner—indicating. A. That would be my parcel Number.

Q. Number 5. A. Yes. That property had a front of 19.5 feet by a depth of 61 feet and contained 1191 feet.

Q. That is right, sir. A. About \$50 a foot, if you related it to land. But I did not appraise these properties like that.

Q. Mr. Mack, did you divide 1191 into 527—does it not come to \$44.75 a square foot? A. I will try. That is right.

Q. All right, sir. That was the corner piece. Now let us go to 440—9th Street, Northwest, Lot 821 containing 1710 square feet. Your total valuation for it \$49,400, and again you did the same thing you did now in No. 2, so your 1710 square feet in relation to your \$49,000, how much is that a square foot? A. Something over \$28.00.

Q. About \$28.89 a square foot to be exact? (859) A. I suppose so.

Q. Let us go to your next one, 438—9th Street, Lot 822, containing an area of 853 square feet. You valued it at \$23,000. A. Yes.

Q. Your total valuation in relation to that square foot of land area is how much—that is the way you did that one, the same as in No. 2—you did not break down your land; what is your total valuation? A. Is that 438—9th Street, did you say?

Q. Yes, 438—9th Street. A. This one had a frontage of 13.97—almost 14 feet frontage by 61 feet in depth. It contained 853 square feet. I might say parenthetically, if you will permit me—if that land was vacant under the Code, you could not build anything on it. Twenty-three-two, is that the figure that you had in mind—\$23,200.

Q. That is right. To save time, \$27.20 a square foot would be right, would it not? A. Yes, if you figure them, I will agree and save the Court's time on all of these, if you wish.

Q. Now, I want you to check me. Is that right or wrong? (860) A. It is correct.

Q. 436—9th Street, lot 8234, containing 826 square feet. You valued at \$23,000 and you did the same thing as you did on No. 2, you did not break down the land value. What is that total valuation in relation to the square footage? A. Do you have it? I will figure it if you want. Of course I was not valuing land. I was valuing the property in toto.

Q. You were valuing what was there, were you not? A. What was there. That is correct. That would be 436 9th Street.

Q. That is it. A. 826 square feet. \$23,000. Just a little short of \$28. a foot. Probably \$27.80 a square foot.

Q. Go to the next one, 418 to 422 and 24 9th Street, Northwest, lot 24 containing 5,511 square feet. You valued the land separately there. What was the value attributed to the land there? A. \$34.00 for 5511 square feet.

Q. 412 9th Street, Northwest, Lot 828—pardon me. I withdraw that. 414 to 416 9th Street, Northwest, being lot 841, land area 5,472 square feet. You also broke (861) broke that down and found your land value there in your parcel 10. A. \$34.00.

Q. \$34.00. A. \$186,000 for that property.

Q. I asked you for the land value. A. That was it. I wrote off the building. The building—

Q. \$34 a square foot, was it not? A. Yes. The buildings were so obsolete that in my opinion the land would be benefited by their removal.

Q. All right. So it is essentially a land sale.

Now, 412 9th Street, Northwest, lot 828 containing 2,143 square feet. Your total valuation, \$54,500; in relation to the land value how much was that a square foot? A. The valuation of that property which I capitalized—

Q. Your total value in relation to your square footage is how much? A. I have a total value of \$55,500.

Q. That is right. You have 2,143 square feet.

(862) You did the same thing with that that you did with No. 2. So how much is that a square foot? A. Something short of \$46.00—wait a minute. I am sorry.

Q. Something short of \$26. A. \$26.

Q. Right? A. Yes.

Q. 913—we are going to D Street, lot 829, containing 1943 square feet. You did the same thing as you did with parcel 2. You had \$47,000. What was that in relation to your square footage—that is 913 D Street. A. Something a little over \$24 on D Street.

Q. That was on D Street, was it not, at 931 D Street, lot 831.

By the way, we are now—are we not—getting right behind these alley lots that you appraised for \$40 a square foot? A. I appraised that as a part of the front property.

Q. I did not ask that. You appraised it at \$40 a foot, did you not? A. \$41.14.

(863) Q. Thank you.

Now, your next parcel was of nominal value—a part of a lot. Let us go to your parcel 14, 915 D Street, being lot B containing 2,010 square feet. Again you did the same thing as parcel 2, you valued it at \$38,000. Now, in relation

to the total land value, what is the square foot value? A. You said 915 D Street.

Q. That is your parcel 14, 915 D, lot B. A. 2,010 square feet in the parcel.

Q. Yes. Here it is right here. I am pointing at it. A. Something short of around 19, \$18.00 or \$19.00

Q. 917 D Street, being lot C containing 2,011 square feet. Your value was \$36,100. You did the same thing again. In relation to your square footage, how much is that a square foot? That is your parcel 15. A. About eighteen dollars.

Q. 927 D Street, lots 803, 4,438 square feet, and that one you broke down the land value—no you did not, either. Your total valuation was for land altogether. How much is that in relation to the square footage value, in relation to the square foot area? (864) A. Did you refer to parcel 16?

Q. Parcel sixteen, being lot 803, which is right here (indicating). A. Yes. That is only an alley property with an old structure upon it.

Q. With a frontage on D Street instead of on a thirty foot alley, is not that right? A. It is in back of a parking lot which is leased out, so it had no right of frontage on D Street.

Q. Lot 803 is behind a parking lot. A. No, it fronts on D Street.

Q. Fronts on D? A. Yes, but the front part had been leased out to others as I recall.

Q. But the lot is on D Street and no on this thirty foot alley? A. Well, it is at the back side—

Q. It has got your 30 foot alley and it has got D Street; is that what you are saying? A. Yes, it runs through from D to the alley.

Q. How much was that a square foot? A. It had 23.5 foot frontage. It had 4438 square feet in the total lot. The valuation of this (865) property in toto was \$102,550.

Q. How much a square foot? A. I am sorry to be a little slow. I have this data on different sheets in my report.

Q. \$23.00 times 4438, would that give you the answer? A. About \$23.5 more or less.

Q. Now, the next comes the Milstone property that you referred to yesterday, Lot 8, 806 and 807. Let me point that out to you. That is this corner piece, that is this right here, and on this, this lot 807 runs by—right in here, right—that takes in this whole corner, does it not? A. Yes, it takes in the northeast corner of 10th and D Street.

Q. It is in full view of Pennsylvania Avenue, is it not? A. Yes. It had 122.16 frontage on D and 75 feet on 10th Street.

Q. And essentially this is on Pennsylvania Avenue, is it not—is this not where the Apex comes right here with a very narrow point? (866) A. Well, there is a very significant difference with respect to land use and development. It is not on Pennsylvania Avenue, because under the zoning provisions, a frontage on Pennsylvania Avenue, which is an unusually wide thoroughfare, you could build high, 135 feet. Now on D Street, you could only go to 95 feet, I believe, but you have the benefit of the 10th Street frontage on that corner, and not the Pennsylvania Avenue frontage.

Q. All right. You are talking about FAR, but essentially your location is close to Pennsylvania Avenue there, are you not? A. Oh, yes.

Q. You can see Pennsylvania Avenue from there. A. Yes. I was trying to respond to your question. Was it the same?

Q. Do you compare this property with this subject property? A. Well, I make comparisons with all properties that are comparable.

Q. You did not compare this subject property with the sale of itself in 1962, though, did you? A. I did not think

that was appropriate, because I was valuing it for what it was worth. The mere fact that (867) a property is sold, I have seen them sold at what I thought was too high, and at bargain prices. I think—I knew this sale and gave it consideration but in response to your question, I have to recall to your attention that I appraised this property as a redeveloped office building. That was by theory. If that theory is not applicable, then my estimates are—my estimates of value are not applicable. The properties you have been asking me about, have not the remotest possibility of development according to C-4. They are smidgeons of small parcels.

Q. Are you all done? A. I think so.

Q. Did you not say on direct examination when you were making your appraisal that you were not aware of the sale of the subject property? A. I do not recall saying that. I may have. I am not sure. I knew that the property was sold because I knew that Dicker and Lawrence, the owners, were new owners.

I also had information that the property had been appraised by others. But I did not at that time know the actual consideration that was paid for the property by the purchaser.

Q. And you felt that the Raleigh Hotel and the Star Building was more important than what this property sold for, itself, is not that right? (868) A. Yes, because at the time of the purchase that property was not what I was appraising.

Q. How many times have you told me during the course of the years, that the best evidence of value is the sale of the property, itself? Have you ever told me that? A. There is no question about it, providing it is the same property.

Q. Was this property any different in 1963 than it was in 1962—wasn't it the same building? A. Same building but not the same property. Because, in the interim, between the time of the purchase and my appraisal—and I

have testified to this with as much force as I could on direct—this property had not only been leased pursuant to a contract of redevelopment, but had also been sold in part.

Q. It has been sold?

(Mr. Bernstein) Let him finish. If the Court please, I think the witness should be permitted to finish his answer and not be interrupted by counsel.

(The Witness) I do not mind.

(The Court) Wait a moment, Mr. Mack. This Court will see that you can make the answers. Now, you have not been interrupted up to the present time.

(869) (The Witness) No, sir.

(The Court) So that you go ahead and finish your answer.

This jury are all interested in the facts.

(The Witness) Thank you. If I may then, just to recapitulate briefly, at the time of the purchase of the property, I am sure that it did not have the rights, the property rights, or benefits under which I appraised the property, namely a commitment to lease it, plans to rebuild it, and also consideration of its resale pursuant to redevelopment; it was not the same property in my opinion.

I have stated that it was on those bases, those theories and those approaches that I appraised the subject property.

Further having the many discussions that you and I have had, to which you have referred, I recall similar discussions of Capitol Hill, as such, where there was a wide difference between the purchase price of the property, unrehabilitated, and the resale of the property after rehabilitation. I appraised this property after the rehabilitation.

Q. Those properties were completely finished, were they not, when we took them? (870) A. Yes, yes, they were.

Q. All right. The building was there, was it not? The buildings were done in those cases, were they not, Mr. Mack? A. They were, and I approached this on the same basis that I would think others where I am asked to appraise the property on the assumption that proposed construction has been completed, and my appraisal report specifically so states.

Q. In other words, you were asked to appraise this property as if the building was already done, is that right? A. Well, I am not sure that I was asked to do it. I got the data, I got all the information I could. When I saw the lease and the contract of sale and the plans and specifications, which naturally consistent with good appraisal practice, I used to appraise this property on the basis of its completion according to the plans and specifications and in accordance with the lease which was before me. That was the approach of my appraisal of this property.

Q. Quite so. Now, Mr. Mack, to save time, let me ask you this: In your parcel 18, lot 810, containing 2,737 square feet, you valued at \$59,600, on the basis of (871) 2,737 square feet, would \$21.78 be correct? A. Are you passing by this parcel 17?

Q. No. You have given 62.50 a square foot for that. A. Yes, sir. But that was as the way I found that property, and if that building, which I wrote off, were removed from the property, the valuation would probably be \$75.00. It would cost that much on a \$62.50 purchase in order to make it available for a redevelopment, which I thought was indicated.

(Mr. Liotta) I move that last part of his answer be stricken. It is not responsive. I have asked for his appraised value and he gave it at \$62.50 a square foot.

(The Court) It will not be stricken. The gentlemen of the jury are the sole and exclusive judges of the fact in this case and it will be for them to evaluate.

By Mr. Liotta:

Q. Now, Mr. Mack, your parcel 18, being lots 810, known

as 421 10th Street, Northwest, containing 2,737 square feet, you valued at \$59,600, and I ask you, to save time, will \$21.78 be correct? (872) A. I presume it is.

Q. Is it easier to multiply on that thing you have there?
A. No, I have been dividing. I can multiply on it all right.

Q. I want to make it easy for you, does that sound right?
A. Yes.

Q. 423 9th Street, Northwest, lot 811, containing 2708 square feet—

(Mr. Bernstein) 10th Street or 9th Street?

(Mr. Liotta) 423 10th Street, lot 811, containing 2708 square feet. You valued at \$77,650. Would that be approximately \$28 a square foot.

(The Witness) I am sure it would, yes, sir.

By Mr. Liotta:

Q. 425 10th Street, Northwest, lot 812, 2766 square feet. You valued at \$58,750. Would that be approximately \$21 a square foot? A. I am sure it is, sir.

Q. 427 10th Street, Northwest, being lot 813, containing 1560 square feet, you valued at \$56,000, and that came to approximately \$35 a square foot, is that correct? (873)
A. Yes. None of these prices are inclusive of the improvements.

Q. You did not break it down. It is the same as parcel 2, including improvements, right? A. Yes.

Q. Including improvements, now Square 379, lot 816, 314 9th Street, Northwest. A. You are just a little too far for me, Mr. Liotta. I will catch up.

Q. Your parcel 22. A. Thank you. 314 9th Street, Northwest, being on lot 818, which is 3 down from the corner in square 379. I am pointing to it. A. Yes.

Q. Your total valuation was how much? A. On each of those three, including this one, I had 2500 square feet.

I had a twenty-five foot frontage by a hundred. In this parcel 22, that is the one you referred to—76,000 which would be just a fraction over \$30.

Q. About thirty dollars? A. Yes.

(874) Q. Now, next to the last one, parcel 23— A. These front on 9th Street.

Q. Yes, fronting on 9th Street, parcel 23, 316 9th Street, Northwest, being lot 815, containing 2500 square feet. Again you did not break down the land value so your total value is \$74,000, right? A. Yes, sir.

Q. How much would that be a square foot? A. Just a little short of thirty dollars.

Q. A little short of \$30. A. Yes.

Q. Now, your last one, 318 9th Street, being lot 814, 814 being on the corner, am I right? A. Yes, that building had been remodeled.

Q. That was the best building on that street, was it not—now you broke that down into land value. A. Did you say on the street?

(The Court) Wait just a moment.

(The Witness) You say on the street. You said the best building on the street? Did you mean 9th.

By Mr. Liotta:

Q. 9th or D. I think I was referring to D. A. On D.

(875) That building did not front on D Street. It fronts on 9th.

Q. On that one you broke down the land value. What was your land value per square foot for that corner property? A. \$40 on that little corner. \$100,000 for that 25 foot lot.

Q. As an expert real estate appraiser, did you feel, when you gave this back alley property \$40 a square foot value, do you feel you were fair to all the rest of these people that you appraised property for? A. If that back

lot had not been incorporated into that entire structure, it would have been my opinion that it could not have earned—on the basis of my estimated value. I also corroborated those prices, the land prices were merely one phase of it, by capitalizing the net income, as I testified to, and that in my opinion justified that estimate of land for that use. There is not another six story building in either of the squares.

Except the Houston, I beg your pardon.

Q. Now, do you think you were fair in valuing the Houston at \$37.40 a square foot and you valued this alley property which contains approximately the same square footage for \$40? Do you think you were fair to the people in the Houston Hotel? (876) A. Containing about 20 per cent more.

As I said—and if you will excuse me, I feel obliged to repeat—I appraised that land as being in production for office building use, which is a higher and more productive use than the 40-year old Houston Hotel land.

In my opinion, it was capable and would earn on the basis of that land value.

(The Court) Mr. Mack, I am certain that the jury is interested. Did you evaluate the Houston Hotel on a conversion?

(The Witness) No, sir.

(The Court) Why not?

(The Witness) Well, Your Honor, that property, as you know, or probably may know, was built by Mr. Harry Wardman in 1927. It has been in constant use as a hotel ever since. I had the benefit of the operating experience for the last fiscal year of that hotel. That property is shallow in depth, the building—it is only two small rooms deep with a transverse hall in it. It is equipped with a bathroom for each room. In my opinion, it would be economically and absurdity to undertake to remodel that building for any other use than that to which it is designed and pres-

ently devoted. That building (877) in my opinion is—well, the operating experience shows that it is making money, that it is a profitable structure as it is now.

(The Court) How deep is it?

(The Witness) The property is, if I may refer to my records.

(The Court) Surely.

(The Witness) I have a floor plan of the building and of the lot. Would you care to see a picture of it?

(The Court) No, sir.

(The Witness) To answer your question first, the building is $23\frac{1}{2}$ feet deep. Its frontage is 80-odd feet. In fact, 83. The lot fronts 82.16 feet on the south line of E Street. But it has an irregular depth to 100.5 feet to an alley at the rear. The lot is not rectangular. I have it on the plat if you would like to see it. The building is only 23.5 feet deep.

(The Court) But the property is 100—

(The Witness) Yes, sir. The first floor and the basement level. It has a projection out from the main story which is used for a laundry, and in back of that room for two cars to be parked, one behind the other. Out to that alley entrance at the back. So the building (878) is actually only one-fourth of the depth of the lot. The lot is not, in my opinion, used at its highest and best use. But the lot is committed to this.

(The Court) That is the point the Court is interested in and I presume the jury is interested in. Aren't you valuing all of the property for their highest and best use?

(The Witness) No, sir.

(The Court) Why not?

Because it is a very important matter to this jury.

(The Witness) I would appreciate the chance to respond to your question. The great majority, and if I may, I will go further and say with the exception of probably the two parcels of Sterns, next to it, on 9th Street, which has 5500 square feet in them—the Milstone property on the corner of 10th and D, which has something just short of 10,000—the rest of these properties have anywhere from 800 to 2500—maybe 3,000, up to 4,000 square feet of land area in the parcel. They are improved with largely obsolete structures, however, Your Honor, and are still capable of producing income.

(879) Now, if I were to write off those old structures, in my opinion those lots would have only nominal value. It is not practicable to try and redevelop those lots under C-4. You would not have any space to rent.

(The Court) All right.

Now, Mr. Mack, using the Houston Hotel, because that is what we are concerned with, you say you did not value that at its highest and best use.

(The Witness) Oh, yes, I valued it at—as a hotel. Since it is there, I thought that was its current use. I had not any other higher use for that property.

(The Court) If you will help the Court and jury on this. Why couldn't you convert it in your mind to an office building?

(The Witness) Well—

(The Court) For its highest and best use? In other words, is that property subject to an office building, to be constructed?

(The Witness) I could not say that you could not do it. But I would say that in my opinion it would be economically absurd to do it for these reasons.

(880) No. 1, the property as it exists is throwing off a cash throwoff. It is earning money. It is very shallow from the—it is shallow in the building, as I mentioned. And the

rooms are small. I have already stated you have bath tubs in them. But if you were to attempt to redevelop the current structure, in my opinion as a commercial office space, you would have a situation which would be uneconomical because you would have to still have that hall. That hall takes up one-third of the total floor area of each floor, Your Honor, the room on each side of it.

(The Court) The only point that the Court is trying to make and to help the jury with, the highest and best use for the Houston Hotel property, why would you not use it as an office building? In other words, whatever it would cost. Let us say that it would cost a million dollars.

(The Witness) Well, I thought it would cost that or more.

(The Court) Well, suppose that it did? Why wouldn't you capitalize that property?

(The Witness) If were advising a client—I would say to him, "Leave that building alone and get the income that you can get out of it and go and (881) assemble yourself a piece of vacant land that is unnumbered with some of these buildings—two-story obsolete properties, and you will make yourself a much better deal.

(The Court) The highest and best use then would be—

(The Witness) If you had enough value, your best use would be to get the benefit of C-4, which everyone wants.

(The Court) And have the office building.

(The Witness) Yes, sir, but I feel obliged to mention then in that regard, Your Honor, that the assembly of land is not a simple matter. Sometimes it takes years. Now, here we have in this subject property a relatively high—enormous piece, comparable to other parcels which are already vacant and ready for use. I speak of the part that is vacant now. Also I have to give consideration—I do not want to overburden the Court with language—but these structures upon this site are open. There is no problem of interior demolition, reconstruction, structurally, inside at all. They are open-floor areas with a floor load adequate

for any conceivable purpose. That is a valuable attribute in a property to be redeveloped.

(882) (The Court) Well, of course, as you know, the jury has seen the property.

(The Witness) Yes. I am sorry. I wanted to make the point, that is all. I considered that.

(The Court) Yes.

By Mr. Liotta:

Q. Mr. Mack, do you think it is fair to the owners of the Houston Hotel to value their property—their land, at \$37.40 a square foot with all the disabilities that you just mentioned, and you said it had—and value the property next door at \$60—some odd a square foot? Is that fair? A. Of course, I thought it was fair, Mr. Liotta, in respect to that one facet of my total valuation naturally, I would not have done it. I must answer you in the affirmative.

However, that Houston Hotel property was also valued by comparison with another Hotel property sale in toto and the rental estimate on which capitalization was predicated was based on the least base rental income with another comparable hotel with which I am closely associated and which is owned by an associate of mine.

Q. Where is that—in Dallas, Texas? A. No, that is the Presidential Hotel.

Q. Now, on your direct examination you stated that (883) in your opinion, corners had a 20 per cent better value than property that was not on a corner. A. I am sorry, I said that particular corner, namely, the northwest corner, the Smith property, at 12th and E, in my opinion was a 20 per cent better property than the subject property.

Q. That does not apply to the corner owned by Milstone, is that right? A. Yes, it could apply to that corner. If the Milstone corner is large enough for an economical layout, multiple storied office building, achieving the total use permitted under C-4, but the Milstone property is encumbered

with a five story obsolete wood frame building, that, in order to get its re-use value, must be demolished.

Q. Everything in this square is encumbered with obsolete buildings except the subject property, is not that right?

A. No, sir. The Sobell property on E Street was a good fire-resistant building. That was the second property removed from the subject property to the west. The property occupied by the Luggage Company up on 19th Street. I think it was 423 or 425. It was a very (884) nicely rebuilt property, built according to fire damage regulations about 8 or 9 years ago.

The Atlas Building had been adequately restored as I had mentioned, on the southwest corner of 9th and D Street. In my opinion the properties fronting on D Street, between D and E, the ones that had not already been demolished for parking lot purposes, were all of them obsolete.

Q. Now, I do not want you to discuss any sales made after January 2, 1963, but I want to ask you a question. Turn to page 13 of your appraisal.

Page 13 on the bottom. A. In my report.

Q. Yes, sir.

On your fourth paragraph down you make a statement, "During the last two years constantly repeated statements in the press and elsewhere," do you read that? A. Yes.

Q. "Regarding the proposed construction of the FBI Building on Squares 378 and 379." Do you read that? A. Yes.

Q. Now, are you familiar with articles appearing (885) in the press in relation to the construction of this building for the FBI site?

(Mr. Yochelson) Objection.

(The Court) Yes. Sustained.

(Mr. Liotta) May we approach the bench?

(The Court) Yes.

(886) (At the Bench.)

(The Court) You can take a few minutes, gentlemen, at this time.

(Jury out at 11 a.m.)

(Mr. Liotta) If Your Honor please, the witness, in his appraisal report, brought out by counsel that he was aware of publicity as to the FBI site. I want to know if that publicity of the FBI site and the fact that the FBI site was coming in enhanced the value in reference to this property in any way. That is all I am going to ask him.

(Mr. Yochelson) The stipulation in this case is that the first knowledge of the public of any intent to or intent on the part of the FBI to acquire this site was the lease of January 2, 1963.

(Mr. Liotta) That is not the stipulation, I respectfully submit. The stipulation, as I understand it, and as I agreed to it, was that the public announcement by the GSA was made January 2, 1963.

(Mr. Bernstein) I submit that the Government is engaging in an absurdity: the GSA said they had no knowledge of it. If they are going to (887) impute knowledge to a member of the public.

What is more important, he is reading from a document we do not have and do not know what statements might be in there. I think this is grossly improper. We did not bring up these appraisals.

(The Court) The Court will stay with its ruling and will sustain the objection.

(Discussion off the record.)

Short recess.

(888) (The Court) You may proceed.

By Mr. Liotta:

Q. Mr. Mack, you were aware that you were not the only

one that appraised this property for the United States—these other properties that I talked about?

(Mr. Yochelson) Objection.

(Mr. Liotta) Withdraw the question.

(The Court) All right.

By Mr. Liotta:

Q. Mr. Mack, you had mentioned in your examination yesterday that you considered the Merchants sale as a vacant land sale; for comparable purposes it would have figured probably about a million eight.

As a matter of fact, if you take 35,000 feet and divide it into a million, what do you get? A. You would get about, I suppose, around \$30, but my approach to valuation, if that land were vacant, was not based on the overall area. Frontage, assuming no improvements upon the land, frontage on E Street certainly is more valuable than the alley land.

Q. But we were talking about the sale of the (889) subject property, and we were referring to the sale price.

Is that not right? A. My recollection was that the question was what would I value it for, not what was the property sold for, Mr. Liotta. I may be wrong about that.

Q. All right.

You mentioned that the sale of 12th and E to Antonelli, and so on, took place in December of 1962. A. That is what my records indicate.

Q. Would it change your opinion of value if you knew, sir, that the sale took place in January of 1962? A. I said that was what my records indicate. On second thought, I believe my records indicate January 2 or 3rd of 1962. I have mentioned the date and time here, yes, it is 1201 E Street, Square 290. Formerly there were six lots that were assembled into 16,072 square feet. The sale that I have of the date is January 23, 1962. That is the date of its recordation in liber 11, 7041, in Folio 369.

Q. So the sale did not take place in December of 1962, did it? (890) A. No, the sale took place, I presume, though I have not seen the contract, but I presume the contract was executed at an earlier date, but the recordation was on the 23rd of January of 1962.

Q. The subject sale was recorded when? A. 23 January, 1962.

The subject sale, I beg your pardon?

Q. Yes. A. I do not know.

Q. You do not know? A. No.

Q. Would it change your opinion of value if you knew the subject property was sold one month after the 12th and E Street property, the deed was recorded March 12, 1962? Would that change your opinion of value? A. Not at all for the reasons I previously mentioned. I appraised the property as a finished office building.

Q. And yet you utilized the sale on 12th and E Street and the Raleigh Hotel sale rather than the subject sale to find value, did you not? A. Yes, because the value just for land, that property when it was sold was not the property that I valued (891) when I valued it on the basis of the redevelopment program which was supplied to me by the plans. I do not value the property, Mr. Liotta, under those conditions.

Q. You also considered the Raleigh Hotel sale on 12th and Pennsylvania Avenue, is not that right? A. I knew of it and considered it.

Q. You said you considered it on your direct examination, did you not? A. I considered it, yes.

Q. Were you aware, sir, of the contents of the deed of the Raleigh Hotel to the Hamilton Properties, Inc.? A. Well, I have—

Q. On May 28, 1962? A. I have some information on that. That was not just as I have it in the so-called simple direct transaction. There were some different interests in

that sale, as it was first made, and there was another—my information is that the original purchase actually was not recorded, just the contract of purchase was sold.

Q. Well, in order to save time, if you will please answer the question: Now, the sale was on May 28, 1962, right? A. I am reaching for it among these papers, Mr. Liotta. I will have it in a moment.

According to my records, the Raleigh (892) Hotel contract sale to Hamilton Properties was as of February of 1962. That included the adjacent property of 1113 Pennsylvania Avenue, which was separately purchased for \$115,000, as I recall. Paramount—that was the original purchaser from Raleigh, apparently.

Q. The sale you referred to was about \$100 a square foot, was the one you said was recorded in February, 1962, right? A. There was a later one.

Q. Mr. Mack, I am asking— A. \$2,525,000, yes, that was the one, that consideration.

Q. Did you examine the deed? A. No.

Q. Do you know anything about any terms of the deed? A. There was a half interest at that time in the property and there was an assignment to Hamilton Properties at, I believe \$120,000, finally, nominal markup on the property.

Q. If you were informed that the deed included the real estate, furnishings, fixtures, restaurant, bar equipment and business and the records, the hotel, would that change your opinion of that sale? A. Oh, I was certain that that sale included the (893) improvements upon the land at the time of the transfer. The improvements were there then, all of them.

Q. That was a hotel just like the Houston, was it not? A. Yes, and maybe not so obsolete maybe.

Q. As the Houston Hotel? A. Yes. Now, Mr. Liotta, I did have some knowledge of reasonable purchase, that the reason for purchase, that it was to be used for redevelopment, motivation of purchase.

Q. Mr. Mack, you have used the government lease as a criteria of value. Now, let me ask you this. Since the time these people purchased this property in March of 1962, to the date the Government entered into this lease, do you know from your knowledge whether any private individual ever offered this property in its reconstructed state? A. No, I do not.

Q. In your appraisal, you considered the United States as part of the general market, is that right? A. In my opinion, for this type of property, the United States Government constitutes a very important segment of this market.

(894) Q. Did you make any investigation to determine whether or not the United States needed this property for any special and urgent need? A. No. The fact that the United States, with its judgment and knowledge, entered into a lease contract was sufficient evidence to me of a need for it.

Q. Are you aware of such situations as an appraiser, wherein the United States would lease property that the general market would not? A. Of this type?

Q. Of this or any type. A. If you make it so broad as to say, "Any type," I would say that I know, I can recall in my mind making appraisals on properties which the government had leased, the Federal Government, which probably would have some difficulty in being leased to others. But they were not of this type.

Q. You mentioned that the Federal Triangle had significant effect upon this area. A. It always has had, yes.

Q. Always has had? A. Yes.

Q. For years and years and years, am I right? (895) A. Yes. It has had that effect, not to the extent until recently of causing any significant redevelopment. I think it is one of the effects. I think one of the forces. I believe it is most important—and the most important one would probably be the general movement of C-4 development east-

wardly from that area between Fifteenth and Nineteenth Streets, Northwest.

Q. You also mentioned, sir, that the capitol of the United States—this United States Court House and the courts behind us—the District Building, all had a significant effect upon property between 9th and 10th on E Street, the subject property; did you not testify thus? A. There is no question about it in my mind.

Q. And that significant effect has been there at least for 35 to 50 years, has it not? A. Yes, it has been there while the properties were there. But it is becoming in the market much more significant in my opinion and has been during the last three or four years.

Q. As a matter of fact, nobody jumped in here to lease anything or remodel anything except the United States when they leased this property when it was (S96) reconverted, is that not right? A. Oh, no. I appraised the parcel on the north side of Pennsylvania Avenue—

Q. I am talking about this square. A. In that particular square?

Q. Yes, sir. A. Well, there had been redevelopment, there had been reuse and improvement there in several cases that I noted.

For instance, the so-called Sobell building, the Atlas Building, had been improved. The Luggage Building on 10th Street.

Q. All made into office buildings, is that right? A. No, no. The Luggage Building had not any offices in it. Sobell had the first floor as carpetland, a retail outlet and Sobell on the upper floors had one or two offices incidental to wholesale jewelry supply operation. They were not offices.

Q. As a matter of fact, there were no offices, no buildings, were there? A. In this square?

Q. Converted to office buildings? A. Office buildings conversions? If you restrict me to this particular square, no. But of course, the Milstone Building was an obsolete

office building. I (897) have mentioned that one block to the north, the one in the 500 block of 9th Street, which was converted.

Q. All right, sir. I just have a few more questions.

Let us see now, let us get to your capitalization of income.

Do you have that before you? A. Of the subject property?

Q. Yes.

(Mr. Liotta) I might say, I would again like to reserve my objection to this type of testimony, Your Honor.

(The Court) The record will so reflect your position.

(The Witness) I have it here.

By Mr. Liotta:

Q. Now, you had mentioned in the course of your direct examination that you were familiar with an agreement called—or a commitment, called Woodmen of the World Life Insurance Company, a copy of which I have here. May I show you the copy that has been offered in evidence? A. Yes.

Q. I now show you Defendant Exhibit 3. Are you (898) familiar with that, sir? Is that the commitment you were talking about? A. I believe so, if I may have just a moment to check it to be sure.

Q. All right. A. Yes, this is the copy of the instrument or document to which I made reference in that connection.

Q. This is the instrument that you said was a contract to purchase the property? A. Yes. A commitment purchase.

Q. It was a commitment purchase. Is there a difference in your mind? A. I do not think so. Not between responsible parties.

Q. Both sides were responsible in your opinion in this case? A. No question about it.

Q. Now, the first paragraph states, does it not—

“The Society agrees to pay a sum not to exceed a sum of \$2 million 8 hundred thousand or the appraised value of the property, whichever is the lesser,”

Is that what it says? (899) A. Yes, sir.

Q. Now, what did that mean to you? A. Just what it said.

Q. It did not mean \$2 million-eight. It could have been less, could it not? A. Yes.

Q. Now, you said that the most significant thing you attached to this agreement was the 7.74 per cent constant per annum. A. Yes, sir.

Q. Now, you estimated in utilizing your capitalization approach that the building had a remaining economic life of 45 years, is not that right? A. Well, I estimated for income capitalization purposes, that upon completion, according to reference plans and specifications, that the improvements could be expected to produce a net income, a yearly return, in excess of the value of the land, for at least 45 years.

Q. So, you estimated—as I said—the economic remaining life of 45 years? A. Well, I do not want to get into semantics. There is no remaining economic life. The building does (900) not have to exist in the form in which I appraised it. So, I was considering a total economic life of 45 years.

Q. There is no economic life of the building as it existed at the date of taking? A. Not according to the appraisal. I did it as a finished office building.

Q. You did not look at the improvements at the time? A. Yes. I considered those improvements for another purpose. I was obliged in my computations to do something to which I have not yet testified, namely, to figure out how much it would cost to make what was there into an income—producing office building of the type specified on the plans which I accepted as being valid.

Q. You said it would cost \$1,350,000, did you not? A. About \$10 a square foot of building area, yes.

Q. By the way, have you discussed with Woodmen of the World or any representative any time the meaning of 7.74 per cent? A. With Woodmen of the World?

(901) Q. Or any of its representatives at any time? A. I do not know any of them in this matter. I have done work for them in the past but I have had no discussions with reference to this matter.

Q. You have not discussed the 7.74 per cent clause in this commitment with anyone? A. No, I take it as probably being an objective. As I say, I gave it weight, and that is about the only thing I gave weight to in this commitment.

Q. This would indicate then, if this property—when it was built and made into an office building, would indicate if the appraised value was at \$2,800,000, they would expect 7.74 per cent return or \$216,000 return per annum, right? A. No, sir, not quite. Because the Woodmen of the World, according to this commitment, were not in fact buying the total income productivity, in my opinion, that could be expected from this property.

Q. I am talking about the property covered by the lease which they were purchasing or supposedly purchasing under this commitment. A. They were to get out of that property for that much money, or some other figure unknown to me, they were to get the sum of—

(902) Q. 7.74 per cent constant per annum, right? A. Yes, but that did not reflect in my opinion, the total capitalization rate which would be appropriately applicable in the market to the entire income stream. Because in my computations, they would not get the entire income stream. They had made a leaseback and the leaseback would get some of the income stream out of that property. So they were taking a less risk proportion of it. When I converted to total stream, I used a higher risk—the higher the capitalization rate, the lower the resultant estimate of value.

Q. According to you, then, they had less risk, right? The Woodmen? A. Yes, they were not taking the full risk as a usual purchaser would take it.

Q. All right. They had less risk than the usual purchaser. A. There was that spread of income above, that I thought the property could produce, above what their contract or commitment provided for.

Q. Of course, Mr. Mack, income is income, is it not? Who gets the parts does not make any difference, does it? A. It makes a great deal of difference with the various positions within the total income stream.

(903) Q. That is where you get your value. You do not go breaking down the parts to find out who gets what, do you? A. Correct, that is what I testified to, that I valued the property in its entirety. We are speaking of course only of that part colored red on the plat.

Q. All right.

Now, we are talking about the same thing. Now, do you know from your own knowledge whether or not or how long an economic life that was estimated by the Woodmen of the World Society—in other words, how soon in amount of years did they want to get their money back? A. I do not have the faintest idea.

Q. Would it change your opinion, sir, as to the 45 year economic life you estimated if you were informed that the representative of the Woodmen of the World testified in this Court that he expected to get his return of capital and on capital in 25 years? A. Well, his expectation is his business. I am trying to appraise the property for what I believe its productive capacity is. I cannot visualize a re-developed property there as a modern office building as provided in those plans having a useful productive life of only twenty years.

(904) Q. It would not change your opinion as to the remaining economic life of this property when the purchaser that you are talking about, Woodmen of America, esti-

mated 25 years instead of 45 years in reference to this income stream?

(Mr. Yochelson) That is not an accurate description. The Woodmen of the World said they wanted their money back in 25 years.

He made no effort to estimate the life of the building.

(The Court) All right.

The gentlemen of the jury have heard Mr. Hendrickson testify. The Court does not quite follow the objection. It was still a 25 year period, was it not?

(Mr. Yochelson) Mr. Hendrickson said the proposal made then was that it would be repaid, their money would come back to them in 25 years.

He was asked specifically whether he considered that the building would only have an economic life of 25 years and he testified he did not so consider it, they were not interested in that but they were only interested in a return of their money within the 25 year period.

(The Court) The Court feels that the question asked this witness can be answered then.

Would it make any difference?

(905) (The Witness) To me?

(The Court) Yes.

(The Witness) No, Your Honor, that is their own financing program and it is their's. I am projecting income of what I think is a practical situation with respect to this property.

By Mr. Liotta:

Q. In other words, the way you ignored the purchase price of this property, you are ignoring what the Woodmen of the World were doing with the income stream so far as recapturing interest, is that not right? A. There, of course, the Woodmen of the World is in a different tax situation as a private investor. Woodmen of the World have their

own methods of computing income. I have no knowledge of that. I am appraising real estate and not an insurance company.

Q. Your job as an appraiser, is it not a fact, that it is to interpret value? A. Yes.

Q. It is not to make value? A. No. The appraiser, the minute he thinks he is determining or making value, he is out of character. He is supposed to report value and opinions of what he can (906) find in the market and elsewhere.

Q. You used as a capitalization rate, Mr. Mack, eight and a quarter per cent, I think you said you used, considering the government lease; is that right? A. Only with respect to the income attributable to the improvements, after the provision for a return on estimated land value.

Q. In direct answer to my question, you used eight and a quarter per cent, am I right? A. I used a six per cent and an eight and a quarter per cent in the instance that I believe you are referring to.

Q. Now, the net income you imputed was approximately \$205,659 to the building, using the Government lease, right? A. It sounds right, if I may turn to it here, Mr. Liotta.

Q. All right. A. Did you refer to the net income before recapture of capital, Mr. Liotta?

Q. Yes. A. It was \$266,387.

Q. Then you deducted 6 per cent for the land, or \$60,728, and you arrived at a net income imputable to the building of \$205,659, did you not? (907) A. That I did.

Q. And you capitalized that at eight and one quarter per cent, right? A. It is equivalent to 8.33 level, on a 45 year declining annuity, that would be put into the hands of the investor, eight and a quarter per cent per annum on the amount of investment remaining from year to year upon recapture, yes, sir.

Q. The 45 year life at $8\frac{1}{4}$ per cent, right? A. Yes, but that does not imply that the structure and the land together would no longer return any net capital. It implies that at the end of that time there would still be some \$60,000 net support land value. At that time then it probably would again be economical to rebuild the improvements.

Q. We completely understand you. Just answer the question. It was eight and a quarter per cent? A. Yes, with respect to the improvement part of the property.

Q. Instead of eight and a quarter per cent—let me ask you this, before I ask you that.

One percentage point, or 2 percentage points, one way or the other in a capitalization value of this (908) type could be a tremendous difference or arrive at a tremendous difference in value, could you not? A. Oh, yes. It is like the fulcrum of a lever. That is why appraisers must be conversant with movement of capital in property, not only on realty but other investments.

Q. Then this eight and a quarter per cent was your opinion as to the capitalization rate to be applied to the income imputable to the building when and if it ever was improved right? A. I said a net income after capital recapture.

Q. A net income after capital recapture? A. Yes, because this was an annuity, trying to convert that part of the income into value. An annuity provides for the complete recapture of the capitalized value plus eight and a quarter per cent in this instance on the amount remaining from year to year until final recapture.

Q. What was your factor before recapture? A. One two, one two.

Q. One two one two. A. That is for both.

Q. If you used a factor indicating 25 years, what would you get? (909) A. I do not have that factor with me. I could get it. I do not have it in my files.

Q. Instead of eight and a quarter per cent, you used ten per cent, what would you get?

(Mr. Yochelson) I submit Mr. Liotta is using hypothesis, not supported by the evidence.

(Mr. Liotta) I am questioning, Your Honor.

(The Court) Proceed.

By Mr. Liotta:

Q. Instead of eight and a quarter per cent applied to this net return and you used ten per cent, what would you get, instead of two million four hundred and ninety-two thousand eight hundred thirty six dollars, what would you get? A. I do not know what the factor is in my mind. If I had my tables, I could answer it immediately with a slide rule. But I cannot say. I could only say that you would obviously get some lesser capitalized value; as you increase the capitalization rate, you obviously decrease the capitalized value of the stream that produces it.

Q. And that is all a matter of opinion. A. Well, that is one of the approaches. We think we know what is going on the market, prices, operating expenses, overall prices. They all have to make the (910) picture to make a completion of value.

Q. So, your value—using that method which you relied on 100 per cent, was 3,505,000 as improved, right? A. Yes, but for only this portion of the property, less the cost of putting it into condition to produce this income.

Q. Then you add \$807,000 more for the rest of the lots? A. For the vacant land, which is contiguous with it.

Q. Which would make your total valuation as improved \$403,000 more or less?

(Mr. Bernstein) You mean four million?

(The Witness) Less, of course, the cost of putting the property in condition to obtain that income per year.

By Mr. Liotta:

Q. Your final valuation, considering the government lease that would make your final valuation approximately three million? A. Yes, somewhat less than that, I believe.

Q. \$2,962,000. A. I am sure that is right. That, of course, is for the entire property.

(911) Q. Three million dollars, you say, was the fair market value of this property, \$2,962,000, fair market price of this property as of the date of taking? A. \$2,962,000, yes.

Q. And the total reason for your valuation is because, between the date that these people bought this property for \$1 million, and the date we took it here, the government entered into a contract to lease this property when and if it was constructed into an office building that was your reason, was it not? A. That was an important reason. I also testified that I tested that opinion by setting up, estimating and operating on a basis of multiple tenants for this property, on the assumption that the government was not the tenant.

Q. We will get to that in a minute. A. I did not want to anticipate you.

Q. Don't you think Mr. Dicker and Mr. Lawrence, sitting over there—don't you think they knew what they knew what they were going to do to this building or had ideas what they would do with it when they paid the million dollars for it?

(Mr. Yochelson) I object, the Court please.

(912) (The Court) No, I do not know that the witness can answer the question. But the question can be asked.

(The Witness) Well, I have some knowledge of the operations of these gentlemen with their going into the venture. When a man goes into a venture, he expects to improve and make a profit. If he does not expect that, I guess he does not act. Messrs. Dicker and Lawrence have successfully redeveloped other properties by know-how, by the capital available to them, and the risks they were willing

to take. Therefore, it is purely an assumption and hypothesis. I have never discussed this with them and had no occasion to then. But it is a reasonable assumption that Mr. Dicker and Mr. Lawrence have a pretty good idea that there was a potentially higher and better use for that property when they put their money into it and bought it or they would have had no motivation to buy it.

Q. In your opinion, was the seller of this property in March of 1962—Merchant Storage and Transfer—were they uninformed people? A. I do not know. Since we are in hypothesis, I assume that the Merchant Transfer and Storage Officers, (913) managers of that company, are in the transfer storage business. The fact that they sold that building is further evidence to me of neighborhood change and mutation and it was no longer suitable for their use or they would not have sold it.

Whether or not they are situated in their committee and boards of directors to give consideration and would be interested in going through an intricate thing of redevelopment in the property, I have not the faintest idea.

Q. Would you presume that they would be informed by anyone, or be informed themselves to the extent that they would not give away two million dollars?

(Mr. Yochelson) I object, if the Court please.

(The Court) You may step down for just a moment.

(914) (At the Bench:)

(The Court) What is the basis for the objection?

Isn't this fact the very heart of the case?

(Mr. Bernstein) That is argument. How is this witness prepared to say what they presumed?

(The Court) In other words, Mr. Mach was vice-president of Behrens. Behrens is in the business of property.

(Mr. Bernstein) Yes.

(The Court) Now, I want to know whether or not you take the position that all you have to do is to go down and invest a million dollars in property and get a government lease for five years, and you get back three million dollars?

(Mr. Bernstein) No.

(Mr. Yochelson) I submit they did not buy a million dollars worth of property.

(The Court) All right. Now, he has testified—do you follow me—that everybody in that block owned property of a lesser value because they did not have a government lease; and the testimony of this witness is predicated on the government lease?

(Mr. Bernstein) No, no, sir.

(Mr. Yochelson) I do not think so.

(915) (The Court) The record is going to reflect that.

(Mr. Yochelson) No, sir.

(The Court) Now the question has never been asked of this witness, "What did you value the property at as of January 18, 1963, as it stood, that is as of the day of taking, how much was it worth without the government contract?"

(Mr. Bernstein) Well, Your Honor, he said he testified for redevelopment purposes at \$2 million 9. He tested the assumptions against what it would do with multiple tenancy. He has already testified to that.

(The Court) Because the Court is perfectly willing to put on the record that the testimony so far as I can see is that there is no risk involved, absolutely. All you have to do is go down and put in a million dollars and, before you can expend one nickel, if you can get the contract with the government, or with any other party, you are entitled to three million.

(Mr. Yochelson) That is not the fact, Your Honor.

(Mr. Bernstein) That is not so, Your Honor.

(The Court) That is the way it appears.

(Mr. Bernstein) How about the money spent for architects and engineers and the money for commitments—the filing involved?

(The Court) Then why hasn't (916) the testimony brought it out?

(Mr. Bernstein) Because you won't let us prove what we spent.

(The Court) But the important factor is that Kolb has got it at what?

(Mr. Bernstein) My people spent a quarter of a million dollars, Your Honor, to get it in this state. You said you would not let us prove elements of that.

(The Court) A quarter of a million dollars for what?

(Mr. Bernstein) Over and above, to get architects and engineers.

(The Court) Will you put them on the stand in this case?

(Mr. Bernstein) It is not necessary.

(The Court) The Court is perfectly willing to let that testimony come in.

(Mr. Bernstein) You told us previously not to put any evidence on.

(The Court) That is all right. You can go ahead.

(Mr. Yochelson) Well, I submit that the question—

(917) (The Court) Now, is it clear that this Court will rule that you can bring in all expenses, because the testimony as it appears to this Court is that there is no risk involved.

(Mr. Yochelson) I do not understand what you mean by "there is no risk involved."

(The Court) In other words, Mr. Mack, your expert witness gets on the stand. Now, it is conceded that the building has not been built.

(Mr. Yochelson) That is true.

(The Court) Now, he takes a five-year lease. That is correct, is it not?

(Mr. Yochelson) There was a five-year lease with certain options.

(The Court) \$2,962,000 he says it is worth.

(Mr. Bernstein) May I ask you a simple question: I buy a piece of land on Rock Creek Park; I want to get away from this, to illustrate. Then the Montgomery County Rezones that for office-park. Overnight my property goes from a value of, let us say, fifty or seventy-five cents a foot to \$3 or \$4 a foot. It did not cost me anything.

(918) Am I entitled, if someone takes my property as office-park?

(The Court) You do not get my point. This was not so until the Lewis plan came in. Now, Mr. Mack gets on the stand and testifies the other property is worth \$27—worth \$30—

(Mr. Bernstein) Because you have a piece, for example, a typical piece of 2,011 feet, that was the average, you can't build an office on that many feet. It may be zoned for that purpose, but your corner would take the whole thing. Economically, you would build a monstrosity, build something that had nothing but elevators and stairways in it and no offices. So, the mere fact that zoning permits the use, does not mean economically you can so use it.

(The Court) Well, my only point that I have not got over yet, is that the testimony of both Kolb and Mack is that they take the five-year government lease and they project it into—

(Mr. Bernstein) Right. That is part of the bundle of property rights. They also said they compared it against

private tenancy, multiple tenancy, which they said would be slightly higher.

(919) (The Court) Now, answer this question for me, will you?

Why wouldn't they testify to this jury that, in a multiple tenancy, they have a tremendous risk involved, and that this property is worth their taking the risk?

(Mr. Yochelson) They did so testify. They testified as to multiple tenancy.

(Mr. Bernstein) They took a three per cent vacancy ratio because of risk, and took higher expenses because of risk.

(Mr. Yochelson) This is not in the evidence but Your Honor has said there is only a five-year lease. That is all the government took on the 12th and E Street property, the brand new building at 12th and E. We attempted to, ask Mr. Rankin that, and Your Honor would not permit it.

(Mr. Bernstein) Well, we did—

(Mr. Liotta) May my objection be noted to any cost coming in in this case? I respectfully submit that we are already into the frustration of their business plans and it will just accentuate it.

(The Court) The Court is perfectly willing to (920) let them show any expenditure.

(Mr. Bernstein) That is not the issue.

(The Court) I said you wanted the plans and costs in.

(Mr. Liotta) He said they paid a quarter of a million.

(Mr. Bernstein) You are changing the ruling now?

(The Court) Yes.

(Mr. Bernstein) Now, I am perfectly frank—we have the problem of whether we want, whether we might want to infect the record with error.

(The Court) You are the one that is—

(Mr. Bernstein) We do not think it is necessary.

(Mr. Liotta) You are referring to actual moneys paid, sir.

(The Court) That is right.

(Mr. Bernstein) Let me get a list and show Your Honor. I do not think we want to prove any of those. But I want to show Your Honor a list of that.

(The Court) You can show me the list later, when we get a break.

* * * * *

(921) By Mr. Liotta:

Q. Mr. Mack, your valuation, utilizing this capitalization method, as an indicator of value, came to \$2,962,000?

A. Yes, sir.

Q. I asked you in light of the fact that these people paid \$1 million—ten months before the taking—is it not a fact that you attribute two million dollars to the mere fact that the government entered into a lease with these defendants in so far as value of this property is concerned? A. No, sir, not entirely. That was a part and component of it. But I also had to give consideration to the promotion, development, the idea that this particular part of the total property was susceptible to this kind of use, the incurring of expenses was consid- (922) erable, having competent architectural and engineering plans, survey, getting such a proposal approved and accepted by the District of Columbia, the development—that is, the engineering permit department particularly, I think, with respect to that overpass. Those overpasses over that thirty foot alley which I assumed to be very significant in the use and value of that rear portion of the total building plan. To have the capital to do these things with and to have the courage to meet the expenses and loss of time and the risk—so there were many things involved.

Since you ask me this question, I would say, I have seen equivalent things happen many times particularly where men owned vacant lands that were in the path of develop-

ment, have sold them, and purchasers or developers bought and got them rezoned, developed them into lots—capital, improved rating and sewage and water and came out with prices as high as six, seven or more times the cost of the original land in a short time.

The whole downtown development has to be re-used, because, originally all of this area was cut up into small lots with relatively small structures. So, any significant redevelopment involves the use of (923) capital, time, labor, knowhow, and I believe, including the idea and the ability to get the government to enter into a lease and to also sell a portion of this property, are all a very valuable component part of the bundle of rights which we call a parcel of property.

I do not believe I have any knowledge or could have an opinion as to whether or not Merchants Storage and Transfer wanted to enter into that kind of an operation.

I do know that these people have been successful in taking similar actions with respect to other properties, some of which are nearby.

Q. Are you all done? A. I think so.

Q. Have you got anything else you want to add? A. Not to that question.

Q. The fact of the matter is that you were including in your valuation, were you not, loss of business, frustration of business, you were considering all those factors in your appraisal, were you not? A. No, not any frustration of business. There ain't any business there. I was considering those circumstances—considering those things which were a component (924) part of a redevelopment for a higher use, for a parcel of realty, in order to make it more valuable.

Q. Were you valuing what was there, or what were you valuing as of the date of taking what was not there—what were you valuing? A. As of the date of taking, I was valuing the realty and the lease and the contract of sale—all of those things which existed so far as I knew at the time of the taking.

Q. Do you realize, sir, that the only issue in this case is the just compensation payable by the United States of America, for the property taken? A. I presume it is. That is the usual objective.

Q. Do you understand that under the last statement you made that you were valuing a lease which is part of the just compensation, not over and above the just compensation payable by the United States? A. All of that—

Q. If it was there? A. Excuse me. All of that is incorporated in my estimated value. I considered it all a part of the property taken.

Q. Do you realize that you were valuing this as a unit, real estate? (925) A. Yes, sir.

Q. Now, we are talking about the bundle of rights you were talking about when you used the multiple tenancy situation, too. You used that? A. Yes.

Q. What happened to the bundle that would be due to the United States' offer over and above the amount of the rent reserved? A. I had to assume in multiple tenancy that the government was not in the property. I cannot have both of them there.

Q. You cannot have your cake and eat it. A. I cannot do that.

Q. When you use \$450,000, you are then \$60,000 a year over the government lease, aren't you? A. Yes, in gross rent, but not in net, because of the additional expenses to multiple tenancy.

Q. I did not ask you that. I said you are \$60,000 over the government lease, are you not? A. You said—if you had said gross, I would have said yes, but net, no.

Q. Gross rent. A. Gross.

Q. Gross. (926) A. Yes.

Q. You are \$60,000 over the government lease aren't you? A. Anticipated an estimated gross income on multiple tenancy about as I recall, \$60,000.

Q. Well, using that theory of what you are talking about, you threw one bundle right out the window; what happened to Uncle Sam under that theory? A. He was not there.

Q. He was not there under the other theory, either, was he? A. He was there when I appraised the property on the basis of Uncle Sam's lease. I appraised both ways, but they cannot both be there.

Q. Under your theory of multiple tenancy, did you consider the government worth of lease, considering you arrived at a rent of four hundred— A. I considered the government lease did not exist.

Q. In other words, it exists under one theory and does not exist when it is a benefit to the United States, is not that right? A. No, it had much greater use to me than that. Because of the fact, after all, this government lease is (927) for only five years; five years is a relatively short time in a life, career, and history of a parcel of realty.

Q. Using your premise of the government lease, it was only five years then, too, was it not? A. That is right. It had renewal privileges but I did not consider that because that was merely an option. I considered the five year government lease and then tested that from multiple and made my adjustments accordingly as I considered appropriate.

Q. Under your government lease for the other forty years, you may have to look for someone else to rent this building, wouldn't you? A. Actually, in these approaches, you could assume the government vacated after five years and then it would go to multiple tenancy. There is only \$9,000 difference.

Q. Let us stick to one of your premises at a time.

Your first premise was the government lease, \$390,000 a year. That was your first premise to find value of three million, more or less. A. I think it was \$3,089,000.

Q. I will accept three million eighty-nine. Make (928) it four hundred, whatever it is. A. Three eighty-nine.

Q. That was your first premise, using that lease, was it not? A. Yes.

Q. On that premise you estimated, or it was your opinion that the economic return, the return of that \$389,000, would continue for a period of 45 years, right or wrong? A. Yes, that was the net result of it. That was the reason I did the multiple or both ways. I have no means of knowing whether it would or would not. So, I made my tests to see what difference there would be.

Q. I just asked you to stick to one phase at a time, Mr. Mack.

Now, under the one phase, the government lease, you estimated that the economic life of this money, this return, would be 45 years. In other words, you would receive that money for 45 years, right or wrong? A. That is correct.

Q. What factor and what type of a risk did you consider in the event the government decided to move out at the end of five years? (929) A. Then my alternative approach would become immediately effective.

Q. Now, we are right back in your alternative approach. A. You asked me.

I had to answer, didn't I?

Q. And under that you estimated the rent would be \$452,000 a year. Did you ever consider the increased risk? A. Sure. I increased the cost of operating expenses, added a vacancy allowance and capitalized the income at a higher rate.

Q. Mr. Mack, this one last question: This capitalization process of yours is based, (1) on a building that is not there, right, or wrong? A. It is based on a building which is contemplated, which at the time of the appraisal did not exist.

Q. Had you ever considered the value of this property without this remodeling plan—did you consider the value of this property of what was there on January 18, 1963?

Did you ever consider that? A. No, sir. I have to follow the usual practice of appraising property for its highest and best use.

Q. But you discarded, as far as the (930) present property is concerned, that was not in your opinion the highest and best use? A. Definitely not.

Q. Then in effect, because the government agreed to lease this property between March of 1962 and January 18, 1963, when it was remodeled, the value went up two million dollars; right or wrong? A. It is not quite and totally correct, because even if there had been no government there, under the plan of reuse, I considered that property entirely merchantable for rental to private parties for multiple tenancy and have exhibited that in my appraisal report.

Q. And you realize, of course, that Woodmen of the World would not enter into the commitment under the terms unless the United States signed the lease, you realized that, did you not? A. I cannot say that. I am certain that they have been proven competent people and that they would have given that weight just as I did.

Q. Would you look at paragraph 6 of the commitment? Do you have it in front of you? A. I am sorry. I returned it.

Q. One of the terms of the conditions— (931) paragraph 6, look at that; do you have it? A. Yes.

Q. What does it say? A. It says the lessee—in this case the lessee I construe to be the leaseback, actually the vendor lessee—shall have entered into a lease.

Q. In other words, you mean Mr. Dicker, Mr. Lawrence and Mr. Fromkin? A. Yes, they had a dual role here apparently of grantor and lessee. "So, I have entered into a lease with the GSA for a term of five years or more."

"The lessee shall have entered into a lease with the General Services Administration for a term of five years or more, which is at the date of purchase in force and effect, said lease shall provide for an annual rent of not

less than \$388,992.92 payable in monthly instalments of \$32,416.66, with options to renew from year to year, at a rent of \$417,000, payable in equal monthly installments."

A renewal apparently was made some \$27,000 in excess of the original lease contract.

(Mr. Liotta) No further questions.

REDIRECT EXAMINATION

By Mr. Yochelson:

Q. Mr. Mack, are you familiar with the (932) government lease, the duration of the government lease on the Smith building at 12th and E Streets, Northwest?

(Mr. Liotta) Objection. Improper redirect. Irrelevant and immaterial. Your Honor had already ruled on that once, if I may say.

(The Court) Objection overruled. The witness may answer.

(The Witness) I am sure I have a reliable record of the general terms of the lease.

By Mr. Yochelson:

Q. Just the duration—what is the term of the lease?
A. You are referring to the government portion of the structure—the portion that the government leases?

Q. What portion of that total structure does the government lease? A. A third of eleven floors, I believe, is what they have. According to my records, the lease was dated during August of 1962, but made effective as of March, 1963. and it also is a five year lease with five 1-year options.

Q. The duration of that lease, I asked you the duration of the lease involved in this case. A. In so far as the term of it?

(933) Q. That is the only thing, as to terms. A. Yes.

Q. Mr. Liotta has directed your attention to some opin-

ions of value that you gave him in other properties in this and in an adjoining square, one of which was your opinion of the value of the Houston Hotel.

You have described this property as an old hotel. A. Yes.

Q. How many stories high was it, or is it? A. It is a 12-story high at the ground level, hotel, above the ground.

Q. What was your total valuation on this property?

(Mr. Liotta) Objection. Irrelevant. It has no bearing on this case whatsoever. I was getting at land value. I submitted—I submit it is improper redirect examination.

(Mr. Yochelson) The Court please—

(The Court) Objection overruled. The witness may answer.

(The Witness) I am sorry, Mr. Yochelson, may I have that question again, please?

(934) By Mr. Yochelson:

Q. What the total valuation or opinion of value reached by you as to the Houston Hotel, what that was. A. Of the Houston Hotel.

Q. Yes. A. I am sorry, Your Honor—I have so many parcels and so much data here, it will take just a moment.

(The Court) That is all right, Mr. Mack.

(The Witness) \$650,000.

By Mr. Yochelson:

Q. And this was your total of value of land and improvements? A. Yes. The property as it is.

Q. How much was the total land area? A. 6,579 square feet.

Q. So that the total value per square foot of land and improvements would be approximately \$100 per square foot, would it not? A. Well, arithmetically—

(Mr. Liotta) Objection.

(The Court) Overruled.

(The Witness) Arithmetically, yes, sir. But the figure has no significance to me. I am valuing (935) these properties in their entirety, not related to the land. I think if that land had been bare, because it is useful, big enough for a multi-story office building would be worth about \$60 a square foot. Therefore, the building improves the land.

Q. The building does what to the land? A. Improves the land. The building and land are worth more than—in my opinion, the land would be if it were bare. So the building still improves the land.

Q. But your estimates of the value of this land without the building would be \$60 a foot? A. I would say so.

Q. Why, then, would you put a \$37 dollar value on the land with the building? A. Because that building encumbers the value of the land. The building is not the highest and best use, but it is still too valuable to remove for the reason I just mentioned. Since you related this to \$100 a square foot, if you took the building off, the land, would not be worth \$100 a square foot. Therefore, it is improved to remove this.

Q. In your judgment, is there any inconsistency (936) with the appraisal of the Houston Hotel land and the value you placed on the land in the subject property. A. Well, the figures are not the same. But the potential—the actual use of the Houston, the potential and reuse of this land is. The land is only worth what the land can produce under its use. I think that is a basic fallacy. Land is not necessarily land when it is encumbered with a property, it becomes a part of it; just a roof and pump and the rest.

(Mr. Yochelson) No further questions.

RECROSS EXAMINATION

By Mr. Liotta:

Q. Mr. Mack, in reference to the Smith Building, that

was a brand new building, was it not? A. Yes. The Smith Building was a brand new building. The land was purchased, I believe, and at that time it was encumbered with some obsolete—

Q. You are not telling us they built that building just to get the five year government lease, are you? A. No, not any more than I am saying that with respect to this property.

Q. It just so happens Uncle Sam leased that building after it was built. A. I do not know when the lease was entered into with relation to completion of the construction.

(937) My recollection is that the building—under this date of purchase and the date of the lease—I think that when the lease was made, the building was not ready for occupancy. They were practically simultaneous.

Q. But it is synonymous or the same as a situation that you have presented to this Court in reference to this building, is it not? A. With respect to timing, no. But with respect to the fact, yes. This building was leased to be occupied when construction plans were completed, according to the plans.

That was the basis for it.

Q. That was this building? A. Yes.

Q. And that was a new building, that Smith building?
A. Oh, yes.

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(939) JOHN D. POWELL

a witness called by the United States in rebuttal, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Sluga:

Q. Please speak distinctly with a clear voice so all the members of the jury can hear you.

What is your full name? A. John D. Powell.

Q. Where do you live? A. 2761 North Wyoming Street, Arlington, Virginia.

Q. By whom are you employed? A. General Services Administration, Public Building Service.

Q. What are your duties in the GSA? A. I am the building manager, what is known as the Archives Justice Field Office, and responsible for (940) the operation, maintenance, renovation, repairs and security of certain buildings as defined within that group.

Q. Is the FBI acquisition clearly within that group? A. Yes.

Q. Are you familiar with 920 E Street Northwest, a building at that place? A. Yes.

Q. Is that included also in your tour of duty A. Yes.

Q. Did there come a time when you were authorized to release certain personal property, to wit, certain window frames on that building at 920 E Street, Northwest? A. Yes.

Q. Do you recall when you were authorized to do so?
A. The records will indicate when that was done.

It was on September 16, 1963.

Q. When did you receive your authorization to release these window frames? A. The authorization came on September 13, 1963.

Q. From whom did you receive that authorization? A. From Mr. Groschan, Chief of Land Management, GSA.

(941) (The Court) Will you spell that name, please, sir?

(The Witness) G-r-o-s-c-h-a-n.

By Mr. Sluga:

Q. What measures did you undertake to secure the delivery of these windows? A. I prepared and issued a

permit to the Arthur Vanneri Company, represented by Mr. J. P. Goodloe, property manager.

(Mr. Sluga) I ask that this be marked for identification.

(The Clerk) Plaintiff's No. 5.

(Plaintiff's Exhibit 5 marked for identification.)

By Mr. Sluga:

Q. I hand you GSA form 1582 dated December 1959, a revocable license for non-Federal use of real property.

Is that what you are speaking about? A. It is.

Q. To whom was that issued? A. To the Arthur Vanneri Company—1225 K Street, Northwest, Washington, D.C. Specifically to Mr. J. P. Goodloe, Project Manager of that company.

Q. What was the purpose of that particular license? (942) A. To permit the removal of certain aluminum windows.

Q. Does it give a number of how many windows there were? A. 249.

Q. And was that done, and on what day if it was done? A. Yes, that was accomplished on the 16th of September, 1963.

Q. Is there any evidence that this work was completed? A. Yes—

(Mr. Yochelson) Do you mean removal of the windows?

(Mr. Sluga) Yes, sir.

(The Witness) Yes. There is a note on the license, in my handwriting, dated September 16, 1963, at 4 p.m., that this work was completed at approximately 3:30 p.m.

(Mr. Sluga) I ask that this be admitted into evidence, Your Honor.

(The Court) The Court does not understand, and I would like to have it clarified. This pertains to two hundred and some windows.

(943) (Mr. Sluga) Window frames.

(The Court) Had they been installed?

(Mr. Sluga) Had they been installed?

(The Witness) No, they were in crates.

(The Court) I see.

(Mr. Sluga) I ask this be admitted into evidence, Your Honor. I have no further questions of this witness.

(Mr. Yochelson) No question—no objection.

(The Court) It will be received.

(Plaintiff Exhibit 5 received in evidence.)

(Mr. Yochelson) We have no cross examination of this witness.

THORTON W. OWEN

DIRECT EXAMINATION

* * * * *

(946) Q. Mr. Owen, did there come a time, sir, when you appraised premises known as 920 E Street, formerly the Merchants Storage and Transfer Company property. A. Yes, sir.

Q. When did you appraise that property, sir? A. In the fall of 1961.

Q. And at whose request did you make that appraisal? A. At the request of Mr. John Newbold, who was president of Merchants Transfer and Storage Company.

Q. Mr. Owen, did you bring that appraisal with you in response to the subpoena? A. I did.

Q. Kindly tell us, sir, in reference to your appraisal, what method or methods of appraisal you considered to arrive at your valuation and as of what date?

(The Court) Wait just a moment. Are you (947) through with qualifications?

(Mr. Liotta) Yes, sir.

(Mr. Yochelson) No questions.

(The Court) All right.

(Mr. Yochelson) I would object, however, to appraisal which is dated and made as of the fall of 1961. This is not the credible date nor the date as of which we are seeking the value of this property.

(Mr. Liotta) I respectfully submit, sir, that they have been presenting testimony at this trial that Mr. Newbold was uninformed at the time he made his sale, and this goes to the credibility of their witnesses.

(The Court) And that is the purpose?

(Mr. Liotta) Yes, sir.

(The Court) The objection is overruled and the gentlemen of the jury will understand.

(The Witness) My appraisal is dated December 21. The actual work was done sometime in the middle of November up to that date.

By Mr. Liotta:

Q. Now, would you tell us what properties were included in your appraisal? (948) A. Properties known as lots 48, 50, 817, 818, 831, 836k Lots E, F, G, H, I, and K, all of Square 378, known as 920 through 922 E Street, Northwest, and a building in the rear and a vacant lot to the west of that building.

Q. Now, in reference to that appraisal, what method or methods of appraisal did you consider to arrive at your valuation? A. Well, I considered the physical value of the buildings less depreciation and obsolescence, both from a physical point of view and economic point of view and what it would rent for: What the land in the area had been selling for, to determine the value of the ground and use: Also made up my own mind whether or not the building could be used for any other purposes.

Q. What did you consider the highest and best use of the property at that time, sir? A. Well, the property at that time in my opinion was a taxpayer until such time as it could be removed and the site on which it stood was combined with the land to the east, and a more modern type of structure erected on it.

It was an obsolete type of warehouse.

Q. Did you consider, sir, the possible conversion (949) of this property into anything other than what it is? A. I gave consideration to that but abandoned that for the reason that this piece of property of the building on E Street, that is, was a T-Shaped building and extremely deep. As I recall, it was about 42 feet wide on the street and ran back roughly about 100 feet, then went in an east-west direction.

I do not recall the exact distances but about 20 feet either way, and was wider on the rear alley, about 82 feet. In the back 187 feet which would result in an awkward layout for an office building. It would have a lot of interior space which I would also call "bullpen" space.

Now, the only space they could have light and be assured of light would be on the east side, because the owners also owned the land on the east side but did not own the land on the west side. So, it would be subject to anybody on the west side who could shut off their light even though windows went in there temporarily.

Q. Would you kindly tell us how you went about finding your value in that case? A. I examined the sales that had taken place in C-4 zoned ground, in the general area, and arrived (950) at a ground value, and adjusted the ground value, taking into consideration the irregular shape of the lot.

This did not commence until in the extreme rear. Then the interior lots were of less value. Then I set a reproduction cost to the building, and then depreciated that building. After depreciation, I charted or made an additional charge for obsolescence because it was an obsolete type of warehouse.

Anyone today who wants a warehouse, they prefer it to be on a one-story type operation so it is easier to handle the material. I did the repeat process for the building in the rear.

In my opinion the taxpayers—I would then determine what the buildings would rent for, and arrive at an economic value for the properties.

Q. Now, in reference to your reproduction cost method, what did you assign as the reproduction cost of the building, and go through your mechanics, if you would. A. Well, the main building, that is, the big building I put 70 cents a cubic foot; this building was about 60 years old. I depreciated physically one per cent a year or 60 per cent. The remaining value which was \$300,000, I depreciated 50 per cent to functional obsolescence.

(951) The rear building, was a more modern building, not quite as old and a better shaped building and better laid out for the purposes of a warehouse.

I put that at 65 cents a cubic foot and depreciated it 44 per cent, as when it was built in 1917. I made no charge against that building for obsolescence.

Q. What do you mean by obsolescence? A. Well, warehouse space today, compared to what warehouse space used to be, the old type of warehouse, particularly the one on the front has a ceiling height of anywhere from eight to ten or eleven feet, maybe. Whereas, a modern warehouse today will have a ceiling height of as much as 20 or 25 feet. You use it to stack lumber.

Also the modern warehouse is the one-floor operation so that the merchandise or the material that is being stored can flow, give light from the building, or flow from a railroad siding to a truck dispatching siding on the other side of the building.

This type of building is a multistory building necessitating the handling of the merchandise whenever it comes off the truck, take it upstairs and handle it again to its

spot. Whereas, that is not (952) involved in the other building.

Now, in the rear building, it was built later and built with higher ceiling height than the front building.

Q. What did you assign as land value in your consideration of the reproduction method? A. The basic land value for the building on the front was \$35 a foot for a lot 100 feet deep. In other words, there had been sales in the areas running—that would establish that guide—rather. Then I adjusted that value for the depth of 100—187 feet, and also for the fact that approximately 42 feet, I think, that approximately 40 feet, rather of the width of this lot, in other words, did not begin until you were 100 feet back so the rear was less valuable than the front.

I adjusted that for its depth. So it made that particular site average \$20 a foot. That is the one on which the big warehouse stands.

Q. Lot 48? A. Yes.

Q. In the rear, what did you do? A. The two lots were beside that when valued.

Q. What did you value them? (953) A. We valued those on the same basis, of \$35 a square foot value for 100 foot lot. We adjusted them, however, for the depth of the lots.

In one case one lot runs back 187 feet for a portion of it, and then for a 16.5 foot frontage only runs back 100 feet.

On that lot we put \$28 a square foot overall.

The other lot which ran back 187.5 feet on.

Q. What other lot? A. Lot 818 and 836.

Q. Proceed. A. That lot, likewise, has a piece that starts roughly 100 feet back from the street. Lot 836 is an irregular L-shaped lot, wrapped around the other. I valued that at \$24 a foot.

The interior lots, the ones in the middle of the square which has no street frontage.

Q. Mention the lots. A. Lots 50 I valued at \$20 a square foot.

Lots 831, E, F, G, H, I and K, I valued at \$10 a foot.

Looking at it from another angle, if the improvements were removed the overall value would be about \$30 a square foot.

(954) Q. Overall, \$30 a square foot? A. Approximately that figure.

Q. Now, what did you do in consideration of the capitalization of income of the improvements that were there? A. On the big building, that is, the building facing the street, a portion of this building was developed as offices for the use of the operation, of conducting business within the building.

Assuming that the occupant of the building would maintain the building, except for the roof, take care of the building, like heat and such, I put the office portion at \$2 a square foot and the warehouse portion, being a multi-story building of the type it is, at 50 cents a foot.

I allowed for the vacancies of 5 per cent in rent losses. I allowed for real estate taxes and insurance based upon 80 per cent coverage. I allowed for exterior repairs and realtor management.

Then I allowed for a six per cent return on the previously determined value of the ground to determine a return of improvements. As I previously (958) mentioned, this is an obsolete type of warehouse. Its life tenure is indefinite. So, I thought that anyone doing such a thing would like to have 12 per cent return on his month, being about four per cent depreciation and about 8 per cent return on the investment.

Q. What is the remaining economic life at 4 per cent? A. 25 years. I do not believe that building would be there that long, sir.

Q. Did you finish going through the methods that you considered? A. On the other building, the building in the

rear as I said is a more modern type of building, as I said. It has a higher ceiling height. I rated that at 75 cents a foot. However, being an interior building back in the alley, I allowed 10 per cent for vacancies instead of five. Real estate taxes, insurance, realtor management and so forth, and capitalized it on the same basis.

Q. What is the "same basis"? A. Using the same rates of return I did on the front, 8 plus 4 per cent and 6 per cent on the ground.

Q. What was the purpose of your appraisal? (956) A. I did not know, sir, until I was asked to make the appraisal by Mr. Newbold.

Q. Did you know at the time you were making your appraisal as to the possible sales price of the property? A. No, sir.

Q. What was the amount of your appraisal as of that time and as of what date? A. The valuation of December 21 was \$1 million.

(The Court) December 21?

(The Witness) 1961.

By Mr. Liotta:

Q. One million? A. Yes, sir.

Q. That is for the whole property? A. Yes.

Q. That is considering the property in what you considered to be the highest and best use at that time? A. Yes. What it was and what it could be.

(Mr. Liotta) No further questions, Your Honor.

CROSS EXAMINATION

By Mr. Yochelson:

Q. Mr. Owen, in your judgment, has that property (957) changed in value from December, 1961 until January, 1963 in your opinion? A. Well, this particular sale started a lot of activity in the area. Prior to that the only activity

had taken place had been along 11th and 12th Streets, and two scattered lots in the area between 6th and 7th.

After this sale in 1962, there was another sale. In 1963, there were quite a few sales, in and surrounding this particular square.

Q. Well, between the dates of your appraisal, December 31, 1961 and January 18, 1963, then, there was a good deal of activity engendered by this very sale? A. Partially engendered by this sale, yes, sir.

Q. What effect did that have on the value of this property as of January 18, 1963?

(Mr. Liotta) Objection. The witness testified he appraised it as of December, 1961.

(The Court) Overruled. If the witness can answer, he may.

(The Witness) Well, as to physical value of the structure, it would not have a great deal of value. As to the value of the land, the land would be enhanced (958) to some extent depending on what the sales were.

By Mr. Yochelson:

Q. Are you prepared to testify to what extent this land would have enhanced in the intervening period? A. I have not made such a study.

Q. You have made appraisals of property in this very square, have you not? A. Yes, sir.

Q. In connection with that, have you not made a study of the trend of land values between 1961 and January 18, 1963? A. Well, based on the overall value of \$30 a foot, this would work out to be—there would not have been too much enhancement, probably taking this particular site you are talking about.

In other words, using this base, as I told you I used the \$35 a square foot base for 100 foot depth. If you will look at the map of that particular square, every lot in it is very ir-

regular in shape and the base price would not have enhanced too great—10 per cent, perhaps, maybe fifteen, if it were enhanced.

Q. How, in your judgment, does this property compare with let us say the Milstone property at the (959) corner of 10th and E Street?

(Mr. Liotta) Objection. It is beyond the scope of direct and irrelevant.

(The Court) If the witness can answer.

(The Witness) The Milstone is a corner piece, a more normal shaped lot as far as distances are concerned. This lot is an interior lot and extremely deep.

By Mr. Yochelson:

Q. How much more value does it have because it is a corner lot? A. Quite a bit, sir.

Q. Assign a percentage? A. You cannot assign a definite percentage. A corner lot compared to an interior lot, in this area, would be worth 80 to 100 per cent more.

Q. Mr. Owen, would the fact that this property, the subject property we are now talking about, had a lease with the government, have affected your value, as an office building? A. Well, it would depend on entirely how much the lease is and what the terms of the lease were involved.

Q. Do you know the terms of the lease? (960) A. No, sir.

Q. Let us assume it had a lease with the government for five years with an annual rent of \$389,000 a year.

(Mr. Liotta) Objection.

(The Court) Overruled.

(The Witness) Well, a five year lease, to remodel that building would not be a very favorable lease and it would have to be capitalized at a fairly high rate.

By Mr. Yochelson:

Q. Would you have capitalized it on the basis of the lease? A. It would depend on what the rental was, and the comparable buildings.

You would have to make a comparison of rents and what was offered.

Q. Let me ask you this: Did you not make an appraisal of the Milstone property at 10th and D Streets connected with this very taking? A. I have; yes sir.

Q. What did you testify that the land in that property—
A. I have not testified.

(961) Q. What was your judgment, what appraisal did you give the land? A. I do not have that with me.

Q. Will this help you, sir (handing to witness.)

Is that your appraisal? A. Yes, sir, made October, 1963.

Q. As of what date? A. October 11, 1963.

Q. You were appraising this property as of the date of taking in this case? A. No.

Q. Was this appraisal not made for this case? A. This appraisal was made of the value as of that date.

Q. May I see it?

Will you show me the date on which this was made or for which or as of which it was made? A. That is the date on which the value stood, sir.

Q. The date on which you signed it? A. That is the date on which the value stood.

(962) Q. What date is the value that you were seeking?
A. The value as of that date. It did not specify any dates except when I was making it.

Q. Did you not make it for the trial in this case? A. Yes, as of that particular time.

Q. You were not instructed to make it as of the date of taking? A. I do not know what the date of taking was, sir.

Q. What value did you assign to land in that—

(Mr. Liotta) Objection. That will take into consideration sales as after the January 2nd, 1963 date. It will take into consideration sales made after the 2nd of January, 1963.

Your Honor's ruling is that is not applicable.

(Mr. Yochelson) I submit that what is sauce for the goose should be sauce for the gander. Mr. Liotta asked Mr. Mack this very question: If he did not make an appraisal of this very property. He sought to impeach Mr. Mack by his appraisal of this property.

(Mr. Liotta) He testified as of no sales made (1963) after January 2, 1963.

(Mr. Yochelson) I am not asking him to testify as to any sales at all.

(The Court) The witness may answer.

Show him the report.

(The Witness) Based upon the sales which had occurred in 1962 and 1963, I put a value of \$72.50 on the corner piece.

By Mr. Yochelson:

Q. \$72.50 a square foot? A. Yes, sir.

Q. What did you determine that site's highest and best use to be? A. An office building.

Q. Did you not capitalize that non-existent office building to reach a conclusion of its value? A. Sir?

Q. I say, one of your bases for evaluation of that non-existent office building was the capitalization of return method, was it not? A. Yes, sir.

Q. On a non-existent building? (1964) A. On a modern building.

Q. Is it unusual at all for an appraiser to capitalize a building not then in existence? A. That is a frequent method of checking valuation against it. This value was based on not only that but comparative sales, also.

Q. But that is an accepted method, is it not? A. That is an accepted method to check other methods.

Q. It is one you employed in this very place, in this appraisal? A. Along then with the other methods of appraisal, yes, sir.

Q. Let me show you the lease which has been admitted in evidence in this case as Property Owners Exhibit 1 and ask you to study it for a moment. A. Yes.

Q. If you had known of the existence of this lease as of the date you made your appraisal, would it have influenced your appraisal?

(Mr. Liotta) Objection. The lease was not in existence at the date he made his appraisal.

(Mr. Yochelson) I know it was not but it was at the date of this taking.

(965) (The Witness) It would have been one of the factors I would have considered.

By Mr. Yochelson:

Q. Would it have increased your judgment of value? A. I could not tell you now until I saw the plans and the cost of what they were doing and what the end result would be, sir.

.

(967) By Mr. Yochelson:

Q. Mr. Owen, are you aware, familiar with the existence, at the taking of this property, of the commitment for sale, leaseback property to Woodmen of the World?

(Mr. Liotta) Objection.

(The Court) Overruled.

(The Witness) I have no personal knowledge except hearsay or scuttlebutt on the street.

Q. Would the existence of such a commitment of that sort have influenced your value? A. Sir?

Q. Would the existence of such a commitment— A. Commitments are based upon appraisals and commitment has no bearing on the value and would not have influenced me.

Q. Well, is it a fair summary to say, Mr. Owen, that you made your appraisal in 1961 based on the assumptions that this could not be practical and economically (968) converted to an office building? A. I did not believe it was economical to convert to an office building for the reasons I have stated. I previously owned a building, gutted it and converted it to a modern office structure. I did not feel this particular building lent itself to that use.

(Mr. Yochelson) No further questions.

* * * * *

GEORGE L. SCHARF

DIRECT EXAMINATION

(969) By Mr. Liotta:

Q. Your name. A. George L. Scharf.

Q. Mr. Scharf, would you kindly talk into the microphone so we will all hear you.

What is your business address? A. 1307 W Street, Northwest, Washington.

Q. What business are you in, Mr. Scharf? A. I am a general contractor.

Q. How long have you been so in that business? A. Since 1937.

Q. Are you affiliated with any company? A. I am affiliated with Prescott Construction Company, Inc.

(970) Q. Who are the members of that company? A. The president is my brother, John G. Scharf. The vice president is Augustus W. Hines, and I am the secretary.

Q. Where did you get the name Prescott Construction Company, Inc.? A. The Prescott Construction Company Inc., was founded by the purchase of the assets of the original Samuel J. Prescott Company.

Q. How long has that could been in existence? A. Since approximately 1890.

Q. Let me ask you this: What is the nature of your work with the Prescott Construction Company? A. Well, the nature of my work starts out with corporate duties, as corporate secretary and director. I am chief acting officer. I supervise construction work, and I estimate construction work.

Q. You estimate construction work? A. Yes.

Q. Let me ask you, sir, in recent years, what are some of the buildings that your company built, or what have you? A. Well, we have constructed the Hecht Company (971) Parkington group of buildings.

Q. Where is that located, sir? A. Arlington, Virginia.

Q. Proceed. A. The Hecht Company Marlowe Heights Building we constructed. We have constructed numerous telephone buildings, among them is the main group at 725 13th Street.

We have remodeled large buildings such as the one at 930 H Street.

Q. What was that remodeled for? A. That building was remodeled for the telephone company as general offices.

Q. Would you say a good percentage of your work is remodeling? A. Yes, I would say a large percentage was remodeling.

Q. And in the course of your duties, do you estimate the amount of money required for remodeling or for construction of buildings to submit bids to owners? A. Yes.

Q. And in the course of your duties, do you review bids submitted by subcontractors? A. Always, yes.

(972) Q. And are you, sir, familiar then with the prices of labor and material as of January 18, 1963? A. I am.

Q. May I ask you, sir—

(The Court) Are you through with the qualifications?

(Mr. Liotta) Yes, sir.

(Mr. Yochelson) No questions.

(The Court) Proceed.

By Mr. Liotta:

Q. Are you familiar with 920 E Street? A. Yes.

Q. Known as the Merchants Transfer and Storage Company formerly? A. I am.

Q. Now, would you know any of the history of that property in relation to activities of your company or its predecessor? A. Mr. Samuel J. Prescott built it.

Q. He built this building? A. Yes, sir.

Q. Which building, the front building? A. Yes, the front building.

Q. How about the rear one? A. I do not know about that.

(973) Q. What year approximately did he build the front building? A. Approximately 1900.

Q. 1900. At my request, did you inspect this building? A. Yes.

Q. Kindly tell us physically what you found there at the time of your inspection?

And the date of the inspection. A. I think I have it right here.

(The Court) You may refer to it.

(The Witness) I believe it was about November 10, 1963.

By Mr. Liotta:

Q. November 10, 1963. A. I beg your pardon.

Q. Sir? A. I beg your pardon. I picked up the wrong date on that. I just do not know right now.

(The Court) If you—did you have an opportunity to go over this file?

(The Witness) Yes, I did.

(974) (The Court) Because the Court will allow you time.
Have you seen it?

(Mr. Yochelson) I have not.

(The Court) Do you want an opportunity to see it?

(Mr. Yochelson) It might be helpful.

(The Court) It may save time.

You gentlemen may take a few minutes at this time.

(Jury out at 2:20 p.m.)

By Mr. Liotta:

Q. I now show you Defendant Exhibit 8. Are you familiar—may I put this on your desk?

(The Court) Surely.

By Mr. Liotta:

Q. Are you familiar with that exhibit?

(The Court) Have you seen it, Mr. Yochelson?

(Mr. Yochelson) Yes.

(The Witness) This appears to be a copy of the permit drawings. However, I note that there are no District building stamps on it.

By Mr. Liotta:

(975) Q. Admittedly that was the same copy that was filed in the District. Did you look at the copy filed in the District? A. It has the same date, yes.

Q. Look at Defendant Exhibit 9. A. Yes. This appears to be the specifications for the building work.

Q. Would you keep those in front of you, please.

Now, Mr. Scharf, at my request, did you review those plans and specifications? A. I did.

Q. Did you review them for the purposes of estimating the cost to remodel that particular property in question in this case, with respect to those plans and specifications? A. I did.

Q. Kindly tell us how you went about doing it. A. I invited the present day operating sub-contractors in various lines to review the specifications and drawings and inspect the premises and to give to me their costs on their estimates on their particular different kinds of work.

Q. Was this done as of January 16, 1963? (976) A. Yes, as of January 18, 1963.

Q. Your cost reflects values as of that date? A. Yes.

Q. Tell me, did you consider that job on the basis of any union, non-union basis or both? A. I considered that on both basis.

Q. Did you have any reason to believe that this property would be reconstructed on a union basis or union scale wages? A. I did. The specifications stated that a copy of the labor department's prevailing wage scale for this area would be in the contractor's office.

Q. Do you have a copy of that prevailing wage scale? A. Yes.

Q. You are familiar with it? A. Yes.

Q. Now, in reference to your report, would you kindly tell us the manner in which you made your report and the estimates that correlate the figures that you have? A. Yes. The manner in which I estimated this was precisely the same as if we were going to build (977) the work ourselves, with my company, for the owners.

We estimated ourselves—my own concrete work and certain other work that my company does perform ordinarily. The subcontractors are the usual sub-contractors that we would use for this type of work. I reimbursed these men for their time and efforts inasmuch as they had no opportunity to make a profit in winning the job.

However, that was figured on a competitive type basis.

Q. With profit included? A. Yes.

Q. Go through your figures, sir, first, the union basis.
A. Yes.

Q. Give us the quantities, too. A. Yes.

Q. Would you kindly go through your figures. A. My estimate for the alterations, 920 E Street, permits \$1500.

Insurance, and so forth, \$19,370.

Taxes, \$3,036.

(978) Photographs and blue prints, \$1,000.

Repairs to alley and sidewalk, \$400.00.

Repairs to adjoining property, \$250.

Cleaning building and cleaning, hauling, \$8790.

Cleaning glass and replacement, \$500.

Construction Office, \$200.00.

Temporary toilets, \$1200.

Water, \$900.

Electricity, \$12,950.

Temporary heat, \$690.

Miscellaneous job expense, \$500.

Surety bond, \$9,297.

Superintendent, \$8,400.

Foreman and timekeeper, \$10,240.

Temporary Protection, \$5,400.

Use and Protection of Adjoining Property, \$1,000.

Fences and barricades, \$2400.

Construction and elevator and hoist—I will have to add these things up in my head here. \$16,755.

(979) Construction plans and equipment, \$700.

Scaffolding, \$8,919.

Construction signs, \$370.

Shoring and bracing, \$1360.

This comprises all of the overhead job expense.

Q. Now, would you get to the rest of your estimate, please? A. Demolition, \$27,652.

Earthwork, \$2947.

You see, I have these, one column is material and the other column is labor. That is the reason I am adding them up to give the total.

Q. We will bear with you. A. The next item is masonry and stone work, concrete work, excuse me. Concrete work, \$47,801.

Masonry and stonework, \$127,250.

Caulking and weatherstripping, \$848.

Structural steel and deck, \$10,467.

Structural steel erection, \$7,665.

Structural steel painting—that is inpainting, miscellaneous and ornamental iron, \$31,617.

Movable partitions, \$82,700.

(980) Ash receptacles, \$570.

Flag pole, \$650.

Rubber mats, \$306.

Toilet room accessories, \$3,757.

Directional sign, \$180.

Name Plates, \$735.

Toilet partitions, \$9,160.

Exterior numerals, \$350.00.

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Venetian Blinds, \$4,050.

Fire Extinguishers, \$928.

Aluminum windows, \$7,800.

Roofing and Sheet Metal work, \$5,037.

Carpentry work and rough hardware, \$17,305.

Aluminum curtain walls, \$24,080.

Aluminum facing, \$37,000.

Finish hardware, \$29,612.

Lathe and plaster, \$124,075.

Acoustical work, \$48,130.

Resilient flooring, \$22,070.

Marble, tile and terrazza, \$33,100.

Doors and frames, \$18,320.

Glass, glazing and entrance, \$11,500.

(981) Painting, \$33,600.

Electrical work, \$309,517.

Plumbing, heating, ventilating and air conditioning,
\$360,120.

Elevators, \$176,000.

The total, with the fringe benefits added to labor is
\$1,737,550.

By Mr. Liotta:

Q. Now, sir, you received estimates from sub-contractors on most of that work? A. Yes, on all work that we do not perform ourselves.

Q. And you have those estimates as part of your file? A. I do.

Q. Would you go to your next consideration without fringe benefits? A. Without the fringe benefits, do you wish me to read these sales—these same ones?

Q. Give me the differences without fringe benefits—what would be the difference? A. Without fringe benefits, the amount of the whole contract would be \$1,600,729.

(982) Q. \$1,600,000-what? A. 600,729.

Q. Now, that is remodeling in accordance with those plans and specifications? A. With consideration, sir.

Q. What is the consideration? A. We had to adjust for leaving out under-floor ducts and leaving out the concrete topping.

Q. Why is that? A. Well, in the files, in your files, I found a note where I believe it was signed by Mr. Dicker, stating to the GSA or confirming that it would be all right to leave out the underfloor duct work.

Q. If that underground—under floor duct work would have been higher—if it were in, that would be much higher? A. Yes, by \$43,000.

Q. Now, also, Mr. Scharf—let me have your report. Do you have it there? A. Yes.

Q. Are you completed with your testimony in so far as this report is concerned? A. Yes, sir.

(983) (Mr. Liotta) I would like this marked and offer it in evidence.

(The Clerk) Plaintiff's Exhibit No. 6.

(Plaintiff's Exhibit 6 marked for identification.)

(Mr. Liotta) And that report Plaintiff's Exhibit 6 has your estimate of subcontractors attached, and has all of the facts and figures in this case? A. Yes, sir, it does—all except the scratch paper.

(Mr. Liotta) I offer this into evidence.

(The Court) Have you seen it?

(Mr. Yochelson) Yes, sir.

We have no objection.

(The Court) Received.

(Plaintiff's Exhibit 6 received in evidence.)

By Mr. Liotta:

Q. Mr. Scharf, at my request, did you estimate the reproduction cost of this property as it existed January 18, 1963? A. Yes, sir, I did.

Q. Would you kindly pull out your notes in reference (984) to the reproduction.

(The Court) Wait now.

Before we leave that, Mr. Scharf, as the Court understands, you testified that the estimate that you gave was unknown?

(The Witness) It was both ways, Your Honor.

(The Court) The second one that you gave, minus the fringe benefits, that is non-union?

(The Witness) Yes, sir.

(The Court) So that bidding on a government job as of January 18, 1963, whether it is union or non-union, the prevailing wage of union controls?

(The Witness) Yes, sir.

(The Court) And on the non-union they do not pay the fringe benefits?

(The Witness) Right.

By Mr. Liotta:

Q. Now, Mr. Scharf, in reference to your reproduction cost, would you kindly pull that out? A. Yes, sir.

Q. What was your estimate of the reproduction cost of the new building as it existed, or the front building (985) as it existed, not improved, as to remodeling as of January of 1963? A. I estimated this cost at \$872,298.

Q. That is to reproduce this structure, new, as of the date of taking? A. Yes, sir.

Q. What did you base your estimate on, sir? A. Well, it was based on the actual experience of constructing a multi-storied warehouse in northeast Washington, by my company, in 1962. We took those figures out of our own files and developed a cost per square foot, and with certain adjustments which were necessary, likened the building we built to this building and arrived at our cost.

Q. What was that per square foot? A. \$8.60 per square foot.

Q. Did you also estimate the reproduction cost of the rear building? A. I did.

Q. As of January 18, 1963? A. Yes, sir.

Q. As a basis. A. As the basis we used the same basis, with certain necessary adjustments, and came to \$393,100.

(1986) Q. As a builder, sir, did you also estimate what, in your opinion, was the physical depreciation of the property?

(Mr. Yochelson) I submit this is not admissible—this is not a builder's function.

(The Court) Are you objecting?

(Mr. Yochelson) Yes, sir.

(The Court) Overruled.

(The Witness) I estimate the depreciation as follows:

On building A, I estimate a 100 per cent depreciation.

On building B, I estimate a 50 per cent depreciation.

By Mr. Liotta:

Q. What do you base your consideration of physical depreciation of building A on? A. I base that on the fact of the age of the building, our experience in the doing of work where we have had to replace all manner of construction where the materials themselves have actually lost their physical strength.

Now, this is something that I believe occurs in all struc-

tures where we do have a certain amount of loss of strength. (987) For instance, when this building was built, they were using in those days a lime or tar. Now, after over sixty years, it would be difficult to think that that lime or tar had any real value other than compressive value. So, consequently, I felt that building A, as a building, actually has lost its strength.

Q. Lost its strength? A. Yes, sir.

Q. How about Building B? A. I feel that Building B is a much better constructed building. It is more modern, and it is a type of building that can withstand the weather elements much better.

(Mr. Liotta) Your witness.

CROSS EXAMINATION

By Mr. Bernstein:

Q. Would you further spell out what you mean by this loss of strength in building A? A. I will try to. The materials, themselves, with the weather beating on them, we certainly have evidence of even steel losing its strength.

Q. You mean that it will not hold weight? A. I mean that it is a certain risk.

(988) Q. It does not serve any function any longer as a sustaining member, whether it be the steel or the concrete, is that what you mean? A. I earnestly believe that it would not hold the strength that it was designed for, yes.

Q. Do you think the floors in building A—those concrete floors would not hold any weight any more? A. It would not hold the weight it was originally designed for.

Q. What weight would it hold as of January 18, 1963? A. I did not put any test on it, sir. That would be a pure test.

Q. Well, you guessed that they lost their strength. Now, how much had they lost and what strength was left in January, approximately? A. I guess they lost about 100

per cent. I would not take the risk of putting anything on that floor.

Q. Do you mean you would not even let a human being stand on the floor? A. I have been in buildings where it was dangerous.

Q. Answer my question. Would you let several human beings stand on the floors there? A. I would not put anyone in there unless I was completely responsible through insurance.

(989) Q. Let us be specific. Let us go to the second floor of building A. Would you let 20 human beings stand on that floor at the same time? A. No, sir, I would not.

Q. Would you let ten? A. No.

Q. Would you let five? A. No, I do not think so.

Q. Did your reconstruction work contemplate the reinforcement of those floors? You bid on the job, did you not? A. Yes.

Q. Did your bid contemplate reinforcing the second floor of building A, yes or no? A. You mentioned the word "reconstruction."

Q. You bid on a reconstruction job of that building? A. I bid on an alteration job.

Q. Alteration. I will let it stand on that word. Did your job that you bid on contemplate reinforcing the second floor of building A?

The floor, I am talking about, the one that you stand on. A. May I look at the drawings?

Q. Yes.

(990) Look at the 3rd, 4th, 5th, 6th and 7th floors, too, because I will ask you the same question.

To save time, you can take any floor from 1 through 7. A. There are structural supports on there; yes, sir.

Q. I did not ask that. Did your remodeling work that you

bid on contemplate putting reinforcements in there of any kind? A. May I see my file?

Q. If we have it, you may.

You can take any one or all of the floors in that building, and the question is, did your construction work or remodeling work contemplate reinforcing any one or all of the floors in that building? Can I help you, Mr. Witness? Would you look at the architect's plans and see if it called for any reinforcement of any of those floors? A. Yes, it does.

Q. What kind of reinforcement, sir? A. Structural steel.

Q. On each of the floors? A. That is correct.

Q. And as so reinforced, would you be able to have people stand on those floors? (991) A. Yes.

Q. How many people on each floor—minimum? A. Oh, I would say 100, 200, maybe.

Q. Would the building, remodeled or reconstructed, and use either word you want, in accordance with those plans—have been fit for the purposes intended, to wit, the use as an office building? A. Yes, I think so.

Q. And carrying all the normal traffic load of people in an office building that those would carry? A. I think so.

Q. Incidentally, you say that as these floors age, that you depreciate them 100 per cent—they have lost their strength. Is that true of most of these old buildings of that vintage? A. I think it is true of building after they are 60-some years old, yes.

Q. How old is the so-called Pension Building which lies behind the Municipal Court Houses? A. That was built right after the Civil War.

Q. That is a lot more than sixty years old? A. Yes.

Q. What is it being used for today? (992) A. I believe for offices.

Q. It has been used completely as offices—the whole building is being used by the Government of the United States, is it not? A. I know it is being used by the government, yes.

Q. Let us take the Civil Service diagonally from Hecht's. How old is that building? A. I do not know, sir.

Q. It is more than 60 years old, is it not? A. It is pretty old, yes, sir.

Q. What is it being used for? A. Offices.

Q. By whom? A. The U. S. Government.

Q. Take another one—the U. S. Treasury Building at 15th Street. How old is that building? A. Better than sixty years old.

Q. What is it being used for? A. Offices and storage of money.

Q. By whom? A. By the United States Government.

Q. Then when you talked about loss of strength and depreciating these floors—

(The Court) Wait a minute. Will you come up here?

(993) (At the Bench.)

(The Court) Don't you think you had better ask him if there has been repairs.

(Mr. Bernstein) I will.

(The Court) Because the Pension Building is completely open on the inside.

(Mr. Bernstein) It has what they call a rotunda, which, incidentally, the carrying load on the floors becomes even more serious because it has to be hung by what they call "suspenders," or it is a free-standing in certain places. It is actually a more severe problem.

Off the record.

(Discussion off the record.)

(994) (In open court.)

By Mr. Bernstein:

Q. On the basis of the several questions I just asked you, would you be willing, and considering the architect's plans for this structure, would you be willing to modify your statement that you depreciate these floors 100 per cent?

A. May I answer your question not yes or no?

Q. Answer it anyway you want, sir. A. I depreciated it 100 per cent as it stands now.

Q. Well, putting a few dollars in, we could bring it back to 100 per cent, is that right? A. Not 100 per cent, but I think you could bring it back to where you could use it for offices.

Q. And with no problems? A. No, other than maintenance.

Q. Do you know many other structures in this historic city of Washington, D.C. which have to carry a lot of traffic of human beings, just like office buildings, many of which are beyond the 60 year period that you spoke of? A. I am sure there are.

Q. There is one classic one—the Washington Monument, is there not? (995) A. Yes.

Q. Now, incidentally, when all of these gentlemen with whom you regularly work—these subcontractors, supplied you subcontractors' bids in connection with these plans, and when you, yourself, supplied what we might describe as the "master bid" or general contractor's bid for the government, all of you were aware that you had no competition in that estimate you were making, were you not? A. Of course.

Q. So that you went out there with very sharp pencils so that you would be sure to get the bid? A. We used our—

Q. I am not questioning your integrity. What I am saying is you did not have to sharpen your pencils, because you were not in competition with other people? A. No,

but we were doing a job for Uncle Sam and we were going to do it right.

Q. But you actually knew you were not going to do the job. A. I knew I was going to have to sit on a witness stand.

Q. I realize that. You have been on many jobs where—after you bid, you got down with sharpened pencils with the owner and cut down your bid and did the job (996) cheaper than originally estimated? A. Only by taking out certain work.

Q. On many a job when you got down and sat down to business with the owner, you cut your estimate, did you not?

(Mr. Liotta) Objection. He was asked to work on these plans and specifications. When his question says, "Whatever basis," when Mr. Scharf says if he removed some of the work—I object to it.

By Mr. Bernstein:

Q. Is it not a fact that within a given set of architectural plans on many jobs that you bid when you sat down to come to grips with the owner, that you lowered your estimate, and you did the job likewise for below what you had originally estimated for the owner, is not that a fact? A. That has occurred. Sometimes that is a contractor's luck, but that is not always the case.

Q. I did not say it was always the case. But, if you had an owner who wanted his money's worth—you would sit down and cut your prices down, would you not? A. No, sir, I am sorry to say we do not—not without the removal of certain work, sir.

(997) Q. Well, at least you knew you had no competition on this job? A. Yes.

Q. You were the only fellow the owner was going to for a bid? A. Yes.

Q. He took yours or he got none? A. Yes.

Q. Have you bid on many jobs where there are lengthy

and excessively high bids for the job—where there might be five or more bidders on the job? A. Yes.

Q. Have you bid on ones where there might be ten or more? A. Ten, my recollection is, but no more.

Q. It is not at all unusual that you could find a spread of as much as 20 per cent between, maybe the one bid and another? A. Yes, sir.

Q. What accounts for that kind of a spread if all the bidders are using the same set of plans and specifications? A. Personal judgment or the contractor's judgment—sometimes his interest or disinterest in the job.

(998) Q. Let us stick to his interest or disinterest in the job for a moment. In other words, is it fair to say that, if he is interested in getting that job, he puts in a low bid and has a real sharp pencil? If he does not care whether he gets the job or not, he puts in a high pencil—right? A. Yes.

Q. You were not going to do the work and were not getting the job so you did not care? A. I did, too. I cared to give the right bid.

Q. How about your subcontractors? A. They did, too.

Q. Did they know they were going to get the job or know that they were not going to get this work. A. They knew they would get paid for giving me their honest answer.

Q. That is the only way you can explain the difference between high and low bids. A. Yes, sir.

Q. Was this fringe benefit business—what is that? A. Fringe benefit has to do with pension, welfare, trust funds.

(999) Q. It is a fact, is it not, that this job could have been built, met all government requirements and standards, including labor costs, without the inclusion of those fringe benefits? A. Yes, sir.

Q. In other words, this job could have been built under your estimate and completely satisfied all of these requirements for one million-six? A. Yes.

Q. Suppose you had actually bid on this job and the owners got down with you with a sharp pencil; wouldn't you surmise it would be possible that you could have reduced the price of the job, or is your one-six inflexible? A. My one-six is not inflexible. That would be the right price without the fringe benefits.

Q. Is your one-six inflexible without the fringe benefit or would it be— A. It would not be inflexible—it would not be flexible.

Q. It would not be flexible? A. No, sir.

Q. Do you get every job you bid on? (1000) A. Not by a long shot.

Q. You are underbid on quite a few of them, are you not? A. We do quite a lot of bidding.

Q. You are underbid on quite a few? A. Yes.

Q. You are more likely to be underbid and not get a job if you are inflexible, are you not? A. That is right.

.

JOHN L. NEWBOLD

(1001) DIRECT EXAMINATION

By Mr. Liotta:

Q. Tell us your name. A. John L. Newbold, 1616 1st Street, Southwest.

Q. Mr. Newbold, in what type of business are you engaged? A. I am president of the Merchants Transfer and Storage Company, engaged in trucking, storage and packing business.

Q. Where does that corporation do business? A. Presently at 1616 1st Street, Southwest.

Q. Now, would you kindly tell me what your position is with the firm. A. I am president of the firm.

(1002) Q. Who are the other officers of the firm? A. Charles A. Hite is the vice president. W. Jasper DuBose,

is secretary, Mr. Paul Bowers is the treasurer. There are some junior officers, also.

Q. Are these gentlemen members of your board of directors? A. Only Mr. Hite.

Q. Who else is a member of your board of directors? A. Mr. Barnum L. Colton, who is the president of the National Bank of Washington, Mr. H. Spottswood White, who is a partner in the banking firm of Q & Locke Company, 30 Wall Street, New York; Mr. John Kinney, with offices in the Ring Building, an attorney; Mr. George A. Garrett, who is retired, a former banker in Washington, and Mrs. Katherine W. Newbold. She is my wife.

Q. Let me ask you this, Mr. Newbold. Were those people members of the board of directors at the time you sold this property to Dicker & Lawrence in 1962? A. I am not sure whether Mr. Hite was a member of the Board or not. He became a member of the Board in the last few years. I am not sure whether he actually was a member or not. I can look it up.

(1003) Q. Were the other people you mentioned members of the Board of Directors? A. Yes.

Q. Are you here in response to a subpoena served upon you by me? A. Yes.

(Mr. Yochelson) May we approach the bench?

(At the Bench.)

(1004) (Mr. Yochelson) Your Honor, I am wondering just what testimony this witness is offered to rebut.

Whether he was or was not informed.

(The Court) I presume so.

(Mr. Liotta) Well that is what I am getting at.

(The Court) That is why he is going through all those names.

(Mr. Bernstein) No one said he was uninformed. That

is not rebuttal. They put in the million dollars in the direct case. They should have put him on then.

(The Court) I do not think it is that important.

(Mr. Bernstein) They are trying to get a tactical advantage by putting him on at the end. I think that is objectionable.

(The Court) No, we will let the witness testify. I think he should have Mr. Garrett as attorney at law, don't you?

(Mr. Yochelson) He has got some real names on that board of directors.

(The Court) All right.

(In open court.)

(1005) By Mr. Liotta:

Q. Did there come a time when you sold the property known as 920 E Street, which I now point to, the two warehouse buildings and the property behind it on E Street Northwest, to Dicker & Lawrence? A. That is correct, we did sell it.

Q. And what was the purchase price? A. The purchase price was one million dollars.

Q. All right. A. Do you want me to amplify on that?

Q. Yes, in a moment.

Let me ask you this: At the time the sale went through for the purchase price of one million dollars, was the contract of sale submitted to your Board of Directors? A. Yes.

Q. Did you request and receive any appraisal advice from anyone before you submitted it to your Board of Directors, or at that time? A. Yes, when we received this offer, I immediately got in touch with Mr. Thorton Owen, who is a well-known real estate appraiser in Washington and asked him to make an appraisal of these properties.

(1006) Incidentally, I asked him to make the appraisal in such a manner that, if the property was condemned and

we had to move out to other facilities, he would take that into consideration. In other words, the replacement of our buildings and so forth.

Q. But he appraised it at the highest price that you could possibly get—right? A. Yes.

Q. You asked him to consider whatever other use of the building was worth in his normal practice, right? A. Yes, I asked him to take into particular consideration condemnation proceedings. That was nothing—that has nothing to do with this at all, but it had to do with the particular possibility that we had had in mind that the Federal Civic Center possibly would go through, and that took in several blocks in that area, and the fact that, if this did take place, we would be faced with condemnation proceedings, ourselves.

Q. You were not forced to sell it, you are not saying that? A. We were not forced to sell it at all.

Q. No one forced you to sell? A. No.

(1007) Q. You were under no threat to sell? A. No.

Q. It was a free and open sale? A. Absolutely.

Q. You took a million dollars? A. Yes.

Q. Your board of directors approved it? A. Yes.

Q. In other words, you asked Mr. Owen to consider everything possible, right? A. Yes.

Q. That sale went through in what year, sir? A. I think it was 1962.

Q. That was the date of the deed, March 12, 1962? A. I think that is it. I think it was 1962. The offer was made in December of 1961, the previous December.

(Mr. Liotta) Nothing further.

(Mr. Yochelson) No questions of this witness.

(The Court) Mr. Newbold, when did you move out?

(The Witness) We were required to vacate by the first of September of that same year.

(The Court) How long was it up for sale?

(The Witness) It was not up for sale.

(The Court) I see.

* * * * *

(1008) (Mr. Liotta) I would like to call Mr. Mackey.

Thereupon

WALFORD A. MACKEY

a witness, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Liotta

Q. Your full name, please. A. Wilford A. Mackey.

Q. Your business address. A. 1918 16th Street, N.W.

Q. What business are you engaged in, sir? A. Title insurance.

Q. Mr. Mackey, are you familiar with premises 920 E Street—933 E Street, Northwest? A. Yes, sir.

Q. Did you bring your records pertaining to 933 D Street? A. I did.

* * * * *

(1012) Thereupon

ROBERT SAVAGE

a witness called in rebuttal by counsel for the government, having been previously sworn, testified as follows:

DIRECT EXAMINATION

(The Court) Mr. Savage, you are still under oath.

(The Witness) Yes, sir.

(Mr. Liotta) I would like the record to indicate that I am presenting this testimony subject to my objection to this type of evidence at all in this case and for the reasons as heretofore stated.

(The Court) The record will so reflect.

By Mr. Liotta:

Q. Mr. Savage, at my request and for purposes of rebuttal in this case, did you consider a capitalization of income approach upon this building if it was remodeled in accordance with the plans and specifications of Mr. Hans Graham? A. Yes, I went into that detail.

Q. Is it understood that you did not agree that it had no— A. I told you so at the time.

(1013) (Mr. Yochelson) I submit, on the basis of this answer, that any further testimony would be improper.

(The Court) Overruled.

By Mr. Liotta:

Q. In reference to this rebuttal testimony, did you utilize the lease that was executed by the United States, enforceable when the building was remodeled? A. Yes, I had the lease in my possession from the beginning.

Q. And you were aware of that lease? A. Yes.

Q. Now, would you kindly tell me how you utilized the capitalization approach on the supposition and for the reasons of rebuttal that I asked you? A. Well, as I stated before, this subject two buildings and this small parking area, lot 50, was for a term of five years, after acceptance for occupancy.

The rate to be \$388,992.02.

Now, the rent for lot 50, in my judgment, was rather firmly established at \$2850. I went through the detail of how I arrived at that previously. So the amount applicable to the buildings is \$386,149.92.

(1014) Opinion as to the cost of operating such a building

on or about January 18, 1963, ranges around \$1.80 a foot. I discussed that and innumerable records were studied by me, and that was my conclusion, \$1.80 per foot, for overall operation of an office building.

Here, however, the heat, the electricity for not only lighting but air conditioning, and the water is assumed by the leasee. So, strict operating expense should not exceed \$142,971.

Now, in addition, taxes have to be paid by the lessor. The taxes in this instance were established for the building as it exists today. But I could only estimate—

(The Court) Wait. All right.

(The Witness) I could only estimate what the taxes would be on this remodeled building, or the building in a remodeled condition.

I estimate that the minimum taxes would be \$30,000. Now, adding your operating items to your taxes you have a total estimated expense of \$172,971. Deducting that from your net, I mean, deducting that from your gross annual income, you have a remainder or net before depreciation of \$213,178.92.

(1015) Previously, I have gone into the land value. That is the value of the land under the buildings we are discussing. I set that up at \$461,617. Capitalizing that at the prevailing rate of 6 per cent, you have a figure of \$27,696.42.

Again subtracting that from the net that I have just given you, you have a net income imputable to the improvements of \$185,482.50.

Now, in my judgment, through experience on income capitalization, I think that this type of building—as a matter of fact, the average old office building or office building I might say, in that neighborhood, I would capitalize at 10 per cent. In this particular instance I would stick to 6 per cent interest, plus 4 per cent depreciation, which is equivalent to saying I estimated a 25 year life for

the building. Or, If you want some variance or tolerance, you would say 7 per cent interest and 3 per cent depreciation, which would be equivalent to a thirty-three and a third year life.

That would indicate a value for the improvement of \$1,854,825. Then you add back your land of \$461,671, and you have a valuation of \$2,316,432.

Now, we are talking about this proposition as an entirety. So, I go on from there. I add \$35,000 for (1016) lot 50 and that of the adjacent parking lots, 817 and 818 and 836, at \$403,594. That gives a value for this property with the reconstituted building of \$2,755,026, or you might say in found figures \$2,755,000.

By Mr. Liotta:

Q. Now, sir, did you make any deductions except from that figure? A. Yes, I went through the same gymnastics of valuing the old buildings as I have previously testified. I estimated the new work from on a cubic foot basis, relying on Peck's Index and Dow Indices, and I know that there can be some variance in the cost but to confirm those opinions to the best of my ability, I consulted with Mr. Scharf—who has been in the estimating business, taking off quantities, for a number of years.

I concluded that the cost would be, of reconstituting this building, reconstituting it would be \$1,712,549. So that would indicate a value for the buildings as they existed at the time of my inspection of \$1,042,477.

I think I should add, however, that I recognize that there can be tremendous variances in construction costs, particularly in a remodeling job as we have here, and if you (1017) wanted to take the view that the construction costs were somewhat on the high side, you could cut them down three or four hundred thousand dollars and you would be very close to my original estimate on this building which was \$3 million—I mean \$1,372,000.

Q. Now, it is understood, sir, that you did not agree with this method at all, did you? A. I did not.

(Mr. Liotta) No further questions.

CROSS EXAMINATION

By Mr. Bernstein:

Q. Mr. Savage, if I understand you, is this a fair summary of your testimony, that you did not feel that the highest and best use of this property was for an office building; but that even if it were, it would not be worth any more than you figured it would be used for as a discount house, warehouse or any other use that you mentioned the other day, is that correct? A. No, I did not say that. I gave you the figure of what a building of this same, reconstituted as an office building—what its value would be. But it is not reconstituted as an office building, or was not at the time that I inspected it, and if you deduct—now, what I said was, (1018) if you deduct the estimated cost of that conversion, you would get back to what I said value of the property as I saw it was.

Q. Will you answer my question? A. I answered it.

Q. Would you read my question back and then will you answer it, please.

(Record read.)

Q. Give your explanation afterwards but please answer the question. A. Yes, sir.

Q. Would you concede, Mr. Savage, even in your vast experience, that it is better and more feasible to use the property as an office building than it is for a warehouse, that, generally speaking, that is a more profitable use for an owner? A. I did not understand it. I did not hear what you said.

Q. I will restate it for you.

Is it not in your trade, and based upon your experience, a fact that generally speaking owners get a greater return from the use of properties as office buildings than they do for use as warehouses or as discount houses? A. I would not say that, no.

(1019) Q. You would not? A. No, sir.

Q. Let's take a site about which there is no question and it is used for an office building. Take anyone that you might have in mind, and you are going to build a structure on that site, is not that true, that if it is a fit site for an office building, that it will generally be more profitable for an owner to build an office building there than it would be for him to build a warehouse or a building there to house a discount house? A. Well, certainly—

Q. Mr. Savage, can't you answer my question yes or no?
A. Just a minute.

(The Court) Wait a moment.

(The Witness) Can I answer his question?

(The Court) Yes.

(The Witness) If I understood the question.

(Mr. Bernstein) If you did not, I will restate it.

(The Court) Wait just a moment.

(The Witness) Pardon me. If the site is obviously best suited for an office building, that is the thing to put there.

(1020) If it was best suited for an office building, it probably would not be at all adaptable for a warehouse. And the reverse is true.

By Mr. Bernstein:

Q. Mr. Savage, we are engaged in fencing here, a fencing match—

(Mr. Liotta) I object to counsel talking that way to the witness.

By Mr. Bernstein:

Q. Let us take the site where the Shoreham Building stands as an example. Let us assume there were no building on that site today, at 15th and H; do you know that site? A. I have been there 40 years.

Q. Right. That is why I took it because I knew you were familiar with it.

I am giving a hypothetical example. We now have a vacant site there. The owner does not know whether to build it into the form of a warehouse, which someone wants to lease from him, or to build it so it can house a discount house which someone wants to lease from him, or to build it as an office building. What would you recommend doing? A. I think the answer is obvious, that it would (1021) be in that area as an office building.

Q. Why? A. Because that is an office building neighborhood. It was developed for that purpose. The first one there was the Southern Building, then the Union Trust Building, then the Woodward Building; and finally the Shoreham Building, and you had other office buildings surrounding it. You are going through the same process in a neighborhood of your office today.

Q. Mr. Savage— A. That is obviously an office building neighborhood.

Q. Do owners who are in business in the general community and general market place build monuments, or do they build for profit? What have you found generally to be the mode of operation of owners? A. They build for profit, very few build for monuments.

Q. It is a fact that on the corner of 15th and H Street, Northwest in the District of Columbia, that an owner, it might be anticipated, could make more profit if he built there as an office building rather than if he used that site to build a warehouse or discount house, is that then not a fact? A. Certainly. That is a fact.

(1022) Q. So, it is true, is it not, that all other factors being equal on a given site economically, the owner will fare better, using the site for an office building than he will be using it for a warehouse or for a discount house or for a printing plant—is that right? A. Not at all.

Q. Then we have to start over: I said all other factors being equal—the site being able to physically accommodate

any of these uses, the zoning permitting any of these uses, the trade to customers being there for any of these uses, would not it be anticipated the owner could look to his economic well being and build an office building rather than one of these other purpose buildings? A. Maybe I do not understand you. But the point is that you put an office building in an office building neighborhood. You put a warehouse in a warehouse neighborhood.

Q. Is that your only answer to my question? A. Yes, sir.

Q. Let us get into another subject.

In the District of Columbia, for downtown office buildings, operating with private tenants, what do the figures that the landlord and tenants association, or whatever it is called, show as the average overall cost of operation per foot of rentable space, including taxes? (1023) A. It has been continuing upward.

To the best of my knowledge on January 18, it was about \$1.80.

Q. Correct. Now, how much is the experience— A. That is including air conditioning, which is a very important point.

Q. Yes, sir. And how much do those figures show of that \$1.80 is normally attributable to heat? A. I do not recall.

Q. Let us make it easier. Let's put together heat, light, air conditioning—in other words, all utility service, electrical and gas and so on. How much would it aggregate for the services mentioned? A. On this specific building—

Q. No, no. I asked you the average experience on the landlord and tenants association for downtown buildings in Washington, D.C.

(Mr. Liotta) Objection. No relevancy in this case. We are talking about one building and he is talking about all over town.

(Mr. Bernstein) The witness has testified he did this on the basis of experience. I am testing his experience, if any.

(1024) (The Witness) I do not recall what those figures were. I had the sheets from Bomber Building Managers Association.

By Mr. Bernstein:

Q. Would it be fair to say that all of these elements of power, light, heat, air conditioning, water—for a downtown office building, that the aggregate of these in terms of maintenance costs is not less than 60 cents a foot of the rentable space? A. I do not think it is that high. It is less than 60 cents a foot.

Q. How high is it? A. My recollection is, I did this some time ago, of course—I think it was nearer 30.

Q. You did not do it sometime ago. You just did this since the trial has been on in order to arrive at the figure you testified to here. Where did you get the figures you testified to a few minutes ago? A. These figures in this analysis that I have give you.

Q. Yes. A. I had them months ago.

Q. How many months ago? (1025) A. I would say six months ago, anyway.

Q. Well, in other words, you had this little tidbit you have testified to as long as six months ago. A. I went over it as part of my appraisal detail at Mr. Liotta's request, after I had finished my appraisal, or while I was working on the appraisal, I do not recall which.

Q. Now, since you are in this work every day of the week, you cannot remember the average figures from six months ago when you prepared this? A. No, sir.

Q. What would your best memory be, 40 cents for the collection? A. Do you want the figures for this specific building?

Q. I want the figures based upon the average experience for downtown office buildings. Can you supply that or not?

(Mr. Liotta) Objection. The witness has already answered, Your Honor.

(The Court) Overruled. You may answer if you know.

(1026) (The Witness) I do not recall what it was.

By Mr. Bernstein:

Q. Is it not true that in figuring average costs in office buildings, it is figured against rentable fee? Isn't that true?

A. Yes, it is figured that way, and the building owners and managers' association has that all set up that way.

Q. Would you say that the collection of utility services that I have mentioned would come to—the very least—35 cents a foot at the very least? A. Approximately right.

Q. All right. So that would bring your \$1.80 down to \$1.45 a foot. A. Or \$1.50.

Q. Why do we add fifty cents all of a sudden? A. Because I said that your figure of 35 cents was approximately right. I would rather use my minimum of 30 cents.

Q. Where do you get the 30 from? A moment ago you said you did not know.

(Mr. Liotta) The witness is talking about this particular building and he is talking about something else.

(1027) (Mr. Bernstein) I think the witness can testify, Your Honor.

(The Court) All right.

By Mr. Bernstein:

Q. A moment ago you said—

(The Court) Wait just a moment. The jury has been listening to the testimony. It is the Court's recollection this witness testified in his opinion it was around thirty.

By Mr. Bernstein:

Q. So you have got \$1.50 now. A. Yes.

Q. How many feet, accordingly, did the government lease—

(The Court) Mr. Bernstein, I know it has just been habit, but when you are asking the question, you are turning your back to the reporter and we are losing your voice.

(Mr. Bernstein) I apologize to you and the witness.

(The Court) We want the record to reflect every word. You have a tendency to turn away when you ask the question.

(1028) By Mr. Bernstein:

Q. How many rentable feet under this lease? A. I estimated 103,011 if I remember correctly.

Q. 103,000 times \$1.50 is what, sir? A. Well, it is roughly \$180,000.

Q. \$180,000. 103,011 times \$1 is \$180,000. Would you do it again? A. \$150,000.

Q. It is \$150,000, then? A. \$150,000 plus.

Q. Right, that is some \$20,000 less than what you gave as the operating cost, including taxes, in your direct testimony a few minutes ago, is it not? A. I have tried—no, sir. I have tried to give you the figures on this specific building, and you have not wanted me to.

Q. You will answer my question for a moment, if you will, please.

Didn't you testify as to this building, that the operating cost would be \$142,871 plus taxes, that you approximated at \$30,000, would total \$172,871, is that correct? (1029) A. I testified that the operating items which would be less the estimate for heat, the estimate for electricity, and the estimate for water, would be 142,971. That is roughly \$1.42, I think I am figuring right, for the building as heated.

Q. Are you completed with your answer now? A. Yes.

Q. Didn't you testify a few minutes ago that all operating costs, plus taxes, would average \$1.50 if you excluded these utility items that the government is paying for under this lease? A. I said a dollar and eighty. Excluding taxes.

Q. \$1.80 excluding taxes? A. Yes, sir.

Q. Then we will start over. What does the experience of landlord and tenants association for office building show the experience to be in the District of Columbia for downtown office buildings for the average rentable foot cost, inclusive of taxes?

(Mr. Liotta) I object. He has gone over this three times now.

I object.

(Mr. Bernstein) He is now changing what he answered (1030) before I believe.

(The Court) Overruled. The witness may answer.

(The Witness) I said that opinion as to the cost of operating such a building is this: On January 18, 1963, will range around \$1.80 per foot. Now, that does not include taxes.

Then I went ahead to deduct from that—

(Mr. Bernstein) If the Court please, my specific question was what the landlord and tenants association experience shows. The witness' answer is wholly unresponsive.

(The Court) Mr. Savage, do you know?

(The Witness) Your Honor, the reports of Bomber cover a number of buildings, and you have to try and select from those what is generally comparable to what you are appraising. That is why I have worded my answer the way I have.

(Mr. Bernstein) I will leave that subject then.

By Mr. Bernstein:

Q. Now, when you got through with your capitalization of structures, under direct testimony when Mr. Liotta was examining you, you then added in the cost or the value of (1031) ground under the structures, did you not? A. Yes, sir.

Q. And the value of the ground that you added under structures was the value you testified to the other day, considering the highest and best use as a warehouse, did you not? A. Yes, sir.

Q. You did not recompute value based upon an office building use, did you? A. No.

Q. And if it was an office building use, that value would go up of the underlying land, would it not? A. Yes, but the ground next door was not being used for an office. It was used for parking.

Q. I did not ask you the ground next door. I asked you about the ground under the building. Now, let us start over. A. Under the building I added the same value that I used before. You are right.

Q. And that was a value of a lesser use and so forth than office building use, is that not correct? A. I would not say so.

Q. Well, isn't a warehouse use a lesser use than an (1032) office building use? A. Not as far as value in this instance is concerned.

Q. I did not ask in this instance. Isn't a warehouse use a lesser use in the consideration of all people in the real estate market than an office building is? A. I think that is a general question. I would say in this instance I do not think so.

Q. Mr. Savage, if there were a piece of property downtown, which again was suitable under the zoning and by reason of market conditions for other office building use or warehouse use, which would you prefer to put it to?

(Mr. Liotta) Objection. Not relevant to this case.

(The Court) Overruled.

(The Witness) I still maintain that it depends on the neighborhood.

By Mr. Bernstein:

Q. When you testified the other day, if I can recall in summary what you said, I believe you testified that you considered this for the uses which you described and I think it was for warehouse, discount, and some other purposes. A. General investment purposes.

(1033) Q. Right. And that you did not consider for—consider office building use because there were two uncertainties—first, the uncertainty of whether the building could be rebuilt, and second, whether it could be rented. Do I fairly summarize your opinion of the other day? A. No, I do not think completely. I said that I did not think the neighborhood had arrived to the point that an office building was justified. I thought that it was suicide to try and use a sixty-five year old improvement for an office building. My theory was along the lines that what is there should be carried as a taxpayer until an appropriate time to build something better on the entire site—not just in utilization of this one building.

(Mr. Bernstein) Madam Reporter, will you read me that one part of the testimony where he said he thought it was suicide.

(Mr. Liotta) I object. We all heard it.

(Mr. Bernstein) I did not hear it clearly.

(Mr. Liotta) I heard it.

(Mr. Bernstein) Did you say something—

(The Court) The reporter will read it back.

(The reporter read the record.)

(1034) (Mr. Bernstein) Thank you, Madam Reporter.

By Mr. Bernstein:

Q. You think it is suicide to use a 65-year old property and alter it into an office building, do you really mean that? A. I certainly do. I look at the Raleigh Hotel, which is being torn down. I look at the Arlington Building up on Vermont Avenue which was built in 1915 and torn down. I looked at this building and saw what was involved. It was filled

with columns which affects it or will affect the normal rental of the building, being 65 years old, you cannot avoid heavy obsolescence and depreciation of the steel beams, the bricks, the mortar and everything else, and then the point that still impresses me is that one-third of this building to be reconstituted is back in an alley.

Q. Mr. Savage, if you turn around with your feet like I am doing (indicating), do you have 360 degree vision?

(Mr. Liotta) Objection.

By Mr. Bernstein:

Q. When you looked at the Raleigh, did you look at the Evening Star and look at the date in the cornerstone? A. Well, now as to the Evening Star Building, that is a newer building.

(1035) Q. It is? A. It was built in two stages.

Q. Mr. Savage— A. Part of it may be as old as this building. The front part of it. But again the Evening Star Building is—if I remember correctly, just about 100 or 110 feet in depth, back from 10th Street, whereas this building in lineal feet, going back from E Street is over 184.

Q. Mr. Savage, you explain the phrase, if I heard you correctly, "It will be suicide to try to use a 65 year old improvement for an office building." You explained that on the basis of bricks and mortar and the rest of the things that go into physical structure, did you not? A. When I did a study of this building, originally, and when I did the thinking of it as a reconstituted building, I have given full value for the bricks and the mortar that are there.

Q. I put to you—you explained the phrase, "It would be suicide to try and use a 65-year old building for this purpose." Did you explain that on the basis of age of bricks and mortar and so on? I put it to you that the Evening Star Building, by your own vision, if you looked (1036) at the cornerstone, was built in 1901, a few years apart from the front building here, and that that section of the Evening

Star was built in 1920 or 1922, a few years apart from the bad building here.

(1039) By Mr. Bernstein:

Q. Adopting your phrase, if I may, do you consider that it was suicide for the government of the United States to lease this building on the basis that it would be reconstituted as an office building? Was that suicide? A. No, that was their judgment.

Q. That was their judgment, is that what you said? A. Yes.

Q. Incidentally, have you ever seen the cornerstone on the Evening Star Building?

(Mr. Liotta) Objection.

(The Court) Are you going to stay with the question?

(Mr. Bernstein) Yes.

(The Court) All right. Mr. Savage, do you know what they did in the Evening Star Building in detail so far as rebuilding it is concerned?

(The Witness) No.

(The Court) Objection sustained.

By Mr. Bernstein:

Q. If, in fact, the best judgment were to be that this building should be reconstituted as an office building—and I understand your opinion as to that to be good judgment—if, in fact, that were the best judgment would not that double (1040) the value of the land underlying the building?

(Mr. Liotta) Objection. The witness has already answered.

(The Court) The witness may answer again if he has already answered.

(The Witness) No, it would not change my value on the ground.

By Mr. Bernstein:

Q. You would still value the underlying ground as supporting a warehouse, even though, in fact, it were supporting an office building, is that your testimony? A. Yes.

Q. Have you frequent appraisals around a warehouse ground or as to warehouse values even though they have office buildings standing on them, is that your usual practice? A. I appraised warehouse ground with office buildings standing on them—no, sir. That has not occurred.

Q. It just occurred this one time in this case.

(Mr. Liotta) Objection. That is not the witness' answer.

By Mr. Bernstein:

Q. I put a hypothetical question to you in this case. There is an office building constructed on this site (1041) or a building reconstructed into an office building, is the underlying ground still to be valued as warehouse ground? A. I would say reconstituted building that you are picturing, I would have to value this thing as an entirety—I have considered that, and I think that the value for the overall ground, including the ground that is under this building, is the same as I have given it.

Q. I am handing you defendant's exhibits 9, which are a set of specifications, and defendant's exhibit 8, which are a set of blue prints. You have seen the government lease in this case which is plaintiff's exhibit 1, or defendant's exhibit 1, I mean. I put to you this hypothetical question: The building involves, the subject buildings A and B, I should say—have now been rebuilt according to those plans and specifications in front of you and occupied under the lease which you have already seen, being defendant's exhibit 1. Do you still say that the ground underlying those buildings is to be valued in that hypothetical situation as warehouse ground? Yes or no. A. I value it as ground for its highest and best use.

Q. Was that, sir, in that hypothetical question? (1042) A. Not an office building.

Q. Do you mean you still would stick to the theory that its highest and best use is not an office building in the face of a building standing there being so used, is that your testimony?

(Mr. Liotta) Objection, Counsel is arguing with the witness.

(The Court) Yes.

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(1043) (Mr. Liotta) May it please the Court, at this time I present a number of motions. First to strike the testimony and to strike testimony of Curt C. Mack, appraiser on behalf of the defendants, in that his appraisal as presented to this Court is contrary to Your Honor's pre-trial ruling, in that it utilized the Government lease, as a direct indication of his value and in fact, based his value thereon. That it was reflection of a specific and urgent need as the testimony shows, for this property by the United States; that it was based on the capitalization of hypothetical income from an office building not as yet in existence. It was based on other than the sale of the subject property, itself, which I respectfully submit is the best evidence of value. It was based on other than comparable sales. It was based, I respectfully submit, in completely ignoring of the facts in this case, and of pure opinion.

I, therefore, respectfully request Your Honor to strike his testimony and instruct the jury to disregard it.

I also submit the same motion for the same reason as to the testimony of Mr. Stanton Kolb, and I (1044) request that Your Honor strike the testimony of Mr. Kolb.

(The Court) Well, the Court will rule on Mr. Kolb's testimony and will deny that.

The Court will hear from Mr. Yochelson on Mr. Mack's testimony.

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(1047) (The Court) Now, the Court's understanding of Mr. Kolb's testimony was that he used that purely as a

check, and that he predicated his opinion on the capitalization of an office building to be built, and not predicated on the lease or not predicated on the sale, and that the thrust of Mr. Liotta's motion is predicated on using the lease (1048) and the sale.

(Mr. Yochelson) Well, in answer to that, may I say this:

(1) That Your Honor has ruled that for the purpose of establishing the highest and best use of this property, this Government lease was admissible in evidence and was, in fact, introduced and admitted in evidence.

(The Court) For the highest and best use.

(Mr. Yochelson) As establishing the highest and best use of this property, as an office building.

Now, I say to the Court, it seems to me to be impossible to say that this lease is in and establishes to members of the jury that this building could be used—and the Government so states by entering into a lease—as an office building; and that you have the right to consider that this was, in fact, its highest and best use.

(The Court) I do not think there is any question about that.

(Mr. Yochelson) All right. Now, how do we divorce the question of the lease once having come in, and having been introduced for a purpose, how do we then close the door and say to the jury, "Don't consider that except for its highest and best use"?

(The Court) All right. The Court will tell you (1049) why, because the lease is for five years, and Mr. Mack has predicated his testimony on 45 years.

Now, the question for the jury is going to be:

"Is this a suitable place for an office building?"

Because, certainly, Mr. Savage takes the position that this is not a locality for an office building calling for the expenditure of \$1,700,000 or \$1,300,000—do you follow me?

(Mr. Yochelson) The jury has the right to determine that, I submit.

(The Court) Yes, but not predicated on the lease extending for 45 years.

(Mr. Yochelson) No one contends that the lease extends for 45 years.

(The Court) Well, that is what I am trying to get to, is that Mr. Liotta is predicating his motion on the testimony that—the Court is of the opinion that Mr. Mack, at the termination of his testimony, stated that he also capitalized on the multiple tenant.

(Mr. Yochelson) He did. And he said in each instance he arrived at an estimate and ultimate conclusion (1050) of value that was within \$9,000 of each other, based on either method.

(The Court) But, do you agree that the jury is to be instructed—do you follow me—that the question is that they may not use the lease though it extended over 45 years?

(Mr. Yochelson) Oh, certainly I agree with that. It was not a 45 year lease. It was only a five year lease and I would not want the jury to understand anything other than that it was a five year lease.

(The Court) All right. The motion will be denied.

(Mr. Liotta) May my objection be noted for the record?

(The Court) Yes.

(Mr. Liotta) Now, Your Honor, at this time I would like to move the Court for a directed verdict in the range of the Government testimony, that is, in the range of \$1,140,000, to \$1,373,000, on the basis that the defendants have not carried their burden to prove by a preponderance of the evidence the fair market value of the subject property, and therefore, and further, that the only evidence before this Court that is backed by facts and by facts existing as of the date of taking in this case, (1051) was presented by the United States. Therefore, the only credible evidence before this Court is the testimony of the United States.

App. 556

I, therefore, respectfully request Your Honor to direct a verdict in the amount and in the range as heretofore stated of \$1,140,000 to \$1,173,000.

(The Court) Denied.

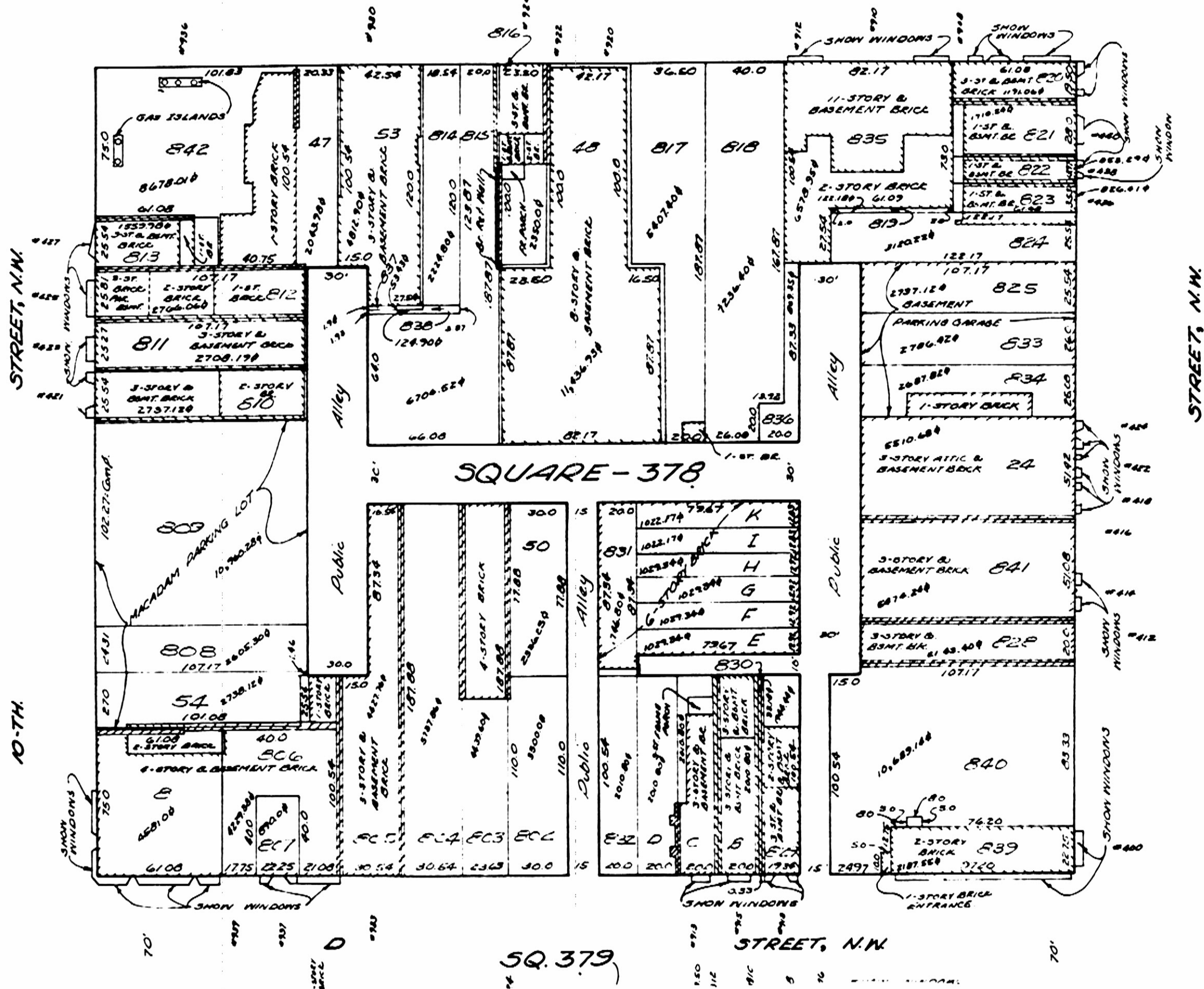
(Mr. Liotta) May my objection be noted for the record?

(The Court) Yes.

EXHIBITS

PLAINTIFF'S EXHIBIT NO. 1 — (See Chart)

STREET, N.W.



1
#1

556A

DEPENDANTS EXHIBIT NO. 3

WOODMEN OF THE WORLD

Life Insurance Society
1708 Farnam Street
Omaha 2, Nebraska

November 8, 1962.

Mr. Alfred M. Bell
Alfred M. Bell & Associates
401 Third Street, N.W.
Washington 1, D. C.

Dear Mr. Bell:

920 E Street N.W.
Washington, D. C.
(Former Merchants Transfer & Storage Co.)

COMMITMENT LETTER

Consideration has been given to the proposal of Messrs. David Lawrence, Albert P. Dicker and David H. Fromkin submitted by you for the sale and leaseback of the property referred to in the caption above.

Woodmen of the World Life Insurance Society, hereinafter designated "Society", offers to purchase and thereafter agrees to lease to the aforementioned individuals or to a corporation formed by them, hereafter referred to as "Lessee," the land together with the building thereon after the latter have been renovated, upon the following terms and conditions:

1. The Society agrees to pay a sum not to exceed \$2,800,000 or the appraised value of the property, whichever is the lesser.

2. The property shall be conveyed to the Society by general warranty deed, and the Lessee shall furnish at its expense a policy of title insurance insuring the title in fee simple in the Society free and clear of any

liens, with exceptions only as approved by the Society's attorney. The cost of furnishing the policy of title insurance and the expense necessary to clear the title and to set up an escrow to handle the transaction shall be borne by the Lessee. The title policy shall be obtained from a title insurance company acceptable to the Society.

3. The Lessee shall furnish at its expense to the Society upon completion of the renovation a complete appraisal of the property by an appraiser approved by the Society who is a member of the American Institute of Appraisers. Mr. Charles C. Koonen, M.A.I., C.R.E., is acceptable.

4. Upon acceptance of this commitment and prior to the completion of renovation an escrow shall be set up with a bank, escrow or title company which shall arrange for the issuance of the title policy and the execution of all papers and documents necessary to the completion of the transaction, including evidence of corporate authority of the corporation to enter into this transaction and to execute the necessary documents. The purchase price shall be deposited for distribution upon the performance of the terms and requirements of this commitment by the escrow agent upon instructions of the Society's attorney.

5. The Society as lessor and the Lessee shall execute in duplicate a lease which shall contain among other provisions the following:

(a) Term—The lease shall provide for a primary term of 25 years from the date of conveyance of title and shall grant to the Lessee the privilege of electing three 21-year renewal terms.

(b) The lease shall provide for the payment of the net annual rent by the Lessee to the Society during the primary term of 25 years and also during each year of each renewal term an amount equal to 7.74% constant per annum, computed upon the basis of the actual purchase price paid by the Society.

Said rent shall be paid in equal monthly installments in advance.

(c) The lease may contain a provision that will permit the Lessee as seller to retain ownership of certain improvements such as elevators, air conditioners and other equipment mutually agreed upon. The Lessee, however, shall not hypothecate, sell, remove, alter or in any way disturb these improvements, and any violation of these conditions shall be deemed a default as defined in the provisions of the lease. At the end of the primary term of said lease, title to all of said property shall be and become a part of the real estate and shall vest in the Society.

(d) The lease shall provide for the payment of additional rent defined as taxes, insurance, assessments, water, electric and other utility rates.

(e) Repair and Maintenance—The lease shall require the Lessee to keep the buildings, grounds, etc., in good and substantial order and repair at its own expense. The term "repair" is to be defined as repairs and changes of a fundamental or a structural nature.

(f) Alterations—The lease shall permit the Lessee at its own expense to make alterations, structural or otherwise, as it may desire, with the consent of the Society, which consent will not be unreasonably withheld.

(g) Additional Provisions—The lease shall contain provisions with respect to insurance, condemnation, assignments, defaults, use of the premises, destruction by fire or other causes, and such other provisions as shall be mutually agreed to between Lessee and Society.

(h) In addition to the execution of the lease, a notice of lease may be executed for the purpose of filing the same of record in the proper public office.

6. The Lessee shall have entered into a lease with the General Services Administration for a term of five years or more which is at the date of purchase in force and effect. Said lease shall provide for an annual rent of not less than \$388,999.92 payable in monthly installments of \$32,416.66 with options to renew from year to year at a rent of \$417,000 annually, payable in equal monthly installments.

7. The Lessee shall assign to the Society the above described lease to General Services Administration and all renewals thereof and all leases thereafter made with tenants during the primary term and renewal terms of the lease between the Society and the Lessee.

8. All expenses in connection with the transfer of the title to the Society, the execution of the lease, revenue stamps, and other conveyance or documentary tax, premiums on title insurance, expense of escrow and any commissions required to be paid to any agent or broker and appraisal fee shall be paid by the Lessee.

9. All deeds, instruments, title policies and other documents and all provisions thereof shall be subject to the approval of the Society's attorney, who may make requirements for additional documents which are reasonably necessary for the proper consummation of the transaction.

10. If deemed necessary by the Society to employ a local attorney in connection with this purchase and leaseback, the Lessee agrees to pay the fee of such attorney, which attorney shall be selected by the Society.

11. If deemed necessary by the Society's attorney or the title insurance company, Lessee shall furnish a survey which shall show to their satisfaction that the improvements are within the property lines and there are no encroachments.

12. It is understood that the proceeds of this commitment will not be paid out until all improvements

have been completed and all expenses incurred in connection with the construction have been paid or will be paid from the proceeds of the sale.

13. As a condition precedent to the payment of the purchase price by the Society, the department or departments of the United States Government designated by the General Services Administration to occupy the premises shall have accepted the same and have entered in possession thereof.

14. A good faith deposit in the amount of \$14,000 shall accompany the accepted copy of this commitment letter. This deposit shall not bear interest and shall be held by the Society. The deposit will be repaid to the Lessee at the time the transaction is closed. In the event the sale and leaseback transaction is not closed according to the terms of this commitment, the deposit shall be retained by the Society.

15. This commitment shall terminate and the Society shall not be liable hereunder if the sale and leaseback are not consummated and the necessary papers executed on or before May 16, 1963.

16. This commitment shall be accepted by at least two of the parties whose names appear in the first paragraph hereof.

Very truly yours,

JOHN F. FUTCHER,

*Vice President and
Investment Manager*

The foregoing commitment is hereby accepted this 14th day of November, 1962.

/s/ DAVID LAWRENCE

/s/ ALBERT P. DICKER

/s/ DAVID H. FROMKIN

COURT RULING ON REQUESTED INSTRUCTIONS

* * * * *

(1058) (Mr. Yochelson) Now, No. 1, if the Court please, is an instruction simply requiring the jury, or instructing the jury that they shall place a valuation upon the property ascertained by a determination of the most advantageous probable usefulness of the property. I submit that is the law. As a matter of fact, it is not inconsistent with several of the instructions which Mr. Liotta has himself tendered. I think that language we provide is clearer, and I request that the Court give that instruction.

(The Court) Mr. Liotta?

(Mr. Liotta) Your Honor, the instruction is not complete I respectfully submit in the verbiage given, (1059) and would indicate to the jury that they may value this property as if it is already in this highest and best use. For instance the last sentence says, "The owner is entitled to receive a valuation ascertained by a determination of the most advantageous usefulness of the property."

Certainly they can consider the highest and best use but they should not consider this as if it is already in that use. This instruction not being complete in thought to the extent that I have heretofore set forth would be highly prejudicial and I object to it.

(The Court) It will be granted in substance. In other words, it will not be taken out of context.

(Mr. Liotta) Very well.

May my objection be noted?

(The Court) Yes, it will be.

(Mr. Yochelson) No. 3, if the Court please, is a well-recognized statement of the law. By fair market value is meant the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all

uses to which the property was adapted and might in reason be applied.

(1060) (The Court) Mr. Liotta.

(Mr. Liotta) Your Honor please, I object to this instruction in that, again, it is not complete in thought. Again it lets the jury, or puts the jury in the position of considering this property as if it is already adapted to its use, and the end of the sentence, "Might in reason be applied," takes into consideration the frustration of the business plans of these defendants.

I object to it respectfully.

(The Court) Turn to Government's exhibit No. 9, will you? Have you got that there?

(Mr. Liotta) Yes, I do, Your Honor.

(The Court) The Court is of the opinion that the Propertyowners' No. 4 and Government's No. 9 should be read together.

(Mr. Yochelson) No. 3 or 4, Your Honor?

(The Court) No. 3 and No. 9.

(Mr. Yochelson) Your Honor please, with respect to No. 9, I feel in substance it is all right, and I have no objection to it largely. But I do object to one or two clauses which I should like to call to Your Honor's attention, the second paragraph of Government's 9 says:

(1061) "In considering the available uses to which the property might be adapted or devoted, or the highest and best use, the question is what an ordinary prudent businessman would do."

I agree with that, but I do not agree with the rest of it which reads, "And not what the landowners claim they would do."

This tries to separate the landowners from reasonable and prudent men. If the jury decides that what the landowner wants to do is what reasonable and prudent men want to do, they should have the right to consider it, I submit.

(The Court) What about the rest of it?

(Mr. Yochelson) I object, if the Court please, to the final clause in the last paragraph: "While consideration may be given to the highest and best use to which the property could be devoted or was adapted on January 18, 1963, the fair market value is to be determined for the property as it was on that date."

I have no objection to that, but I do object to that which reads "and not as though already devoted or adapted to any prospective, higher or better use."

(1062) This instruction tells the jury they may not consider its adaptability to prospective better uses.

(The Court) Mr. Liotta?

(Mr. Liotta) If Your Honor please, I believe our instruction No. 9, as it is, coupled with their instruction No. 3, would not be objectionable. I object to the deletions that Mr. Yochelson now requests the Court to make on the grounds I submit that is the law as I know it.

(The Court) The Court is of the opinion "and not what the landowners claim they would do" should be allowed.

The Court agrees that "and not as though already devoted or adapted to any prospective higher or better use" should be stricken.

(Mr. Liotta) The second paragraph "and not what the landowners claim they are going to do," you will allow?

(The Court) Yes.

(Mr. Liotta) And you will strike the third paragraph "and not as though already devoted."

(The Court) Yes.

(Mr. Liotta) All right.

(1063) (Mr. Yochelson) I wonder if the court would consider this: "Not what the landowners claim they would do unless the jury believes that what the landowners will do is what a prudent man would do." Would you allow that?

(The Court) Well, Mr. Yochelson, the Court is of the opinion that that is what that says.

(Mr. Bernstein) May I suggest—

(The Court) That is what that says. In other words, what the landowner does is not the controlling factor.

(Mr. Yochelson) "And not necessarily what the landowners would do." I think that would cure that objection, if we could say that.

(The Court) You do not have any objection to that, do you?

(Mr. Liotta) What is that, sir?

(The Court) "And not necessarily," because that is what you are saying.

(Mr. Liotta) I have no objection to that being put in there, Judge. But may my objection be noted as to the deletion from paragraph 3 of Government Instruction 9, the part "And not as though already devoted (1064) or adapted to any prospective higher or better use."

(The Court) Yes.

(Mr. Liotta) As I understand it, paragraph 3 of Defendant's requested instructions will be given with Government Instruction 9.

(The Court) Yes.

(Mr. Yochelson) No. 4, if the Court please, of the Propertyowners' instructions reads:

"You must consider all elements that might affect the fair market value of the property including the lease to the United States, the sale-leaseback to the Woodmen of the World, and all other elements as might influence a reasonably prudent person interested in purchasing the property."

I realize, if the Court please, this goes to the very heart of Mr. Liotta's objection, but I submit that the jury should not be left without some guidance in this important matter.

(The Court) Now, which one are you reading from?

(Mr. Yochelson) No. 4, if the Court please, not the Government's but the propertyowners.

(The Court) Yes. I have got them numbered differently than yours, then. I have it now.

(1065) (Mr. Yochelson) Of the propertyowners.

(The Court) Well, now, wait a moment. Go back on it again. No. 1 is granted in substance. No. 2 is agreed to. That is correct, right?

(Mr. Yochelson) Yes, Your Honor.

(The Court) I do not have No. 3.

(Mr. Yochelson) No. 3, Your Honor, you indicated would combine with No. 9 of the Government.

(The Court) No, I was speaking of No. 4. "You must consider all the elements for its highest and best use of the property that might affect the fair market value of the property, including the lease to the United States, the sale-leaseback to the Woodmen of the World, and all other elements as might influence a reasonably prudent person interested in purchasing the property."

(Mr. Yochelson) Your Honor is going to consolidate that with No. 9 of the Government's?

(The Court) Yes.

(Mr. Yochelson) Well, No. 3, which Your Honor does not have before you, apparently, reads:

"By fair market value is meant the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the property was (1066) adapted and might in reason be applied."

(The Court) What do you say to that?

(Mr. Liotta) Just to make the record clear if I may, Government objects to your granting of instruction 1; does stipulate and agree to instruction No. 2 of the defendants. I am speaking of their instructions now.

I object to the granting of their instruction No. 3.

(The Court) Don't you have No. 3?

(Mr. Liotta) Not the way they have it here.

(The Court) The point is, you have it in different language.

(Mr. Liotta) But the language makes a big difference here. They say, "Might in reason be applied."

We get right back into this frustration of a business plan. I respectfully submit my instruction No. 9 more than adequately states the law as I know it. Now, as far as their instruction No. 4, I object to that in toto.

(The Court) I know you do.

(Mr. Liotta) Well, as to No. 3, I object. Do you want me to get to No. 4?

(1067) (The Court) Yes, get to No. 4.

The Court will grant No. 3 in substance.

(Mr. Liotta) May my objection be noted on the record?

(The Court) Yes. Get to No. 4, now.

(Mr. Yochelson) I have just read No. 4 to the Court.

(The Court) I am speaking to Mr. Liotta.

(Mr. Liotta) Your Honor, I respectfully submit this is in direct derogation of Your Honor's pretrial ruling and takes the sale back to the Woodmen of the World and a lease to the United States, and allows this jury to consider it as an indicia of value. I have objected and maintained my objection as to the Woodmen of the World commitment in that

it was not a contract of sale, it was depending on the need of the United States, was an uncertain price, and has no relationship to the fair market value of the subject property.

(The Court) Mr. Yochelson, it is going to read, "You must consider all elements for its highest and best use," that is for the highest and best use of the properties, "including the lease to the United States, the lease-back to the Woodmen of the World and all other elements as might influence a (1068) reasonably prudent person interested in purchasing the property."

(Mr. Yochelson) Very well, Your Honor.

(Mr. Liotta) May my objection be noted for the record?

(The Court) Yes. So we are taking out "fair market value."

(Mr. Yochelson) Let me see that I am correct:

"You must consider all elements for the highest and best use of the property, including," and so on.

(The Court) Yes.

(Mr. Yochelson) Very well.

(The Court) So, I have taken out "that might affect the fair market value."

(Mr. Yochelson) I shall so read it. But since Mr. Liotta is formally entering objections, may I object to the denial of the Court to grant the instruction as tendered?

(The Court) Yes.

(Mr. Yochelson) No. 5, if the Court please, reads:

(1069) "In determining the fair market value of the property you are not to give it a lesser value because a former owner does not put it to its best use. Its capability of being utilized for better and more productive purposes gives it a market value. Market value is not the equivalent to the amount expended for the property by the owner. The law is that the owner of

the property is to be left pecuniarily in the same position as he would have been had the property not been taken. It is his property and not his investment for which he must be compensated and the United States may neither take advantage of the owners' bargain nor must it guarantee his loss, if any."

(Mr. Liotta) I object.

(The Court) And your objection.

(Mr. Liotta) He talks about "because a former owner does not put it to its use." Again he is getting to the frustration of the defendants' plan here if it was frustrated and gets into the question of indicia of value instead of highest and best use when he speaks of "for better and more productive purposes."

(1070) I suggest and submit that the instruction as requested is not complete and would prejudice the interests of the United States. I respectfully object.

(The Court) It will be granted in substance.

(Mr. Liotta) May my objection be noted, sir?

(The Court) It will be.

(Mr. Yochelson) No. 6, if the Court please, reads:

"Property as used in the previous instructions includes every kind of right or interest attached to or associated with the real estate capable of being enjoyed and recognized as such and upon which it is practicable to place a money value."

(Mr. Liotta) Objection, Your Honor. We are valuing only one thing here, I submit, that is the real estate. They are talking about interest. We are taking all interest as a unit. If this tenant has an interest, there has been testimony here wherein some of their witnesses testified their tenant has \$66,000 over something, and there has also been testimony here which would reflect or indicate to this jury that they are to compensate for the frustration of their business plans. I respectfully object.

(1071) (The Court) It will be granted in substance.

(Mr. Liotta) May my objection be noted for the record?

(The Court) It will be.

(Mr. Yochelson) The last one we have submitted, the Court please, No. 7:

“You are instructed that the United States cannot be excused from paying just compensation measured by the full and complete value of the property at the time of the taking merely because it had the power to vitiate its own lease by the exercise of the power of eminent domain.”

(Mr. Liotta) Your Honor, I object to it. If an instruction could be more prejudicial than this one, I do not know how. “Had the power to vitiate its own lease by the exercise of power of eminent domain.”

The mere fact we took this property either one way or the other should not have anything to do with the question of just compensation in this case. I respectfully object to it.

(1072) (The Court) The last one—have you numbered these?

(Mr. Yochelson) This is No. 7, if the Court please.

(The Court) No. 7. It will be denied.

(Mr. Yochelson) Objection, if the Court please.

(The Court) Yes.

(Mr. Yochelson) These are the only instructions that we have submitted.

(Mr. Liotta) As I understand it—

(The Court) Mr. Yochelson, the Court is of the opinion that your No. 7 is already covered in the general instructions, and I think you even have it, don't you—that they do not guarantee a profit or guarantee that the Government will protect a loss of the property owner.

(Mr. Liotta) What I am fearful of, if the Court please, is simply this: The jury may well say, even though this was by its terms a firm five-year lease, it was really not a firm five-year lease, because at any time that the Government wanted to, they could terminate it. So that you could not look upon it as a five-year lease.

(1073) I say this is not true. It was a firm five-year lease, even though the same extent as if it were a lease with General Motors or someone else who did not possess the power of terminating it by eminent domain. The lease is not to be considered any less valuable because it had, the lessee had within its power the ability to avoid its consequences.

(The Court) I think that the instructions will cover that anyhow.

It is not going to cover it on the lease or the sale or the leaseback in the way you put it.

(Mr. Yochelson) Thank you, Your Honor.

(Mr. Liotta) My objection is noted as to that last instruction, I am sure. May I note my objection?

(The Court) Well, it has been denied.

(Mr. Liotta) Yes, sir, I am sorry.

(The Court) Are you objecting now?

(Mr. Liotta) No, sir, I am not objecting now. I just did not hear Your Honor. I was thinking one way and talking another.

(The Court) All right.

No. 1.

(Mr. Liotta) As to our instruction No. 1.

(1074) (The Court) Have you gentlemen agreed to any of them?

(Mr. Yochelson) Yes, Your Honor, we have agreed. Mr. Liotta has the number upon which we have agreed.

(Mr. Liotta) They have agreed as to No. 1, Your Honor.

(The Court) All right.

No. 2?

(Mr. Liotta) They have agreed to No. 2, Your Honor.

(The Court) No. 3?

(Mr. Liotta) They have agreed to No. 3.

(The Court) No. 4?

(Mr. Liotta) They did not feel this was complete and adequate in itself and asked for further addition to that. I do not know what addition they want to make.

(Mr. Yochelson) My only objection to it is that it is not complete. As far as it goes, it is all right. I have no objection to the language here employed, but I think—

(The Court) It will be granted, and it will be supplemented.

(Mr. Yochelson) Thank you, Your Honor.

(1075) (Mr. Liotta) No. 5 they indicated no objection.

No. 6, Your Honor, the defendants have indicated objection to it. I respectfully submit that this goes to the very nub of this case and I think the jury necessarily has to be instructed that they should not consider any unwillingness of the landowners to part with their land or any frustration of the personal plans of the landowners or any opportunities the landowners may have lost by reason of the taking of their land.

I have cited in my instruction the cases which I submit support the position and the request for the instruction.

(The Court) Well, you see the difficulty that the Court has is that we have No. 6, and we were discussing the items in No. 6 and were trying to distinguish between the highest and best use and the market value of the property as of January 18, 1963. Do you follow me?

(Mr. Liotta) Yes, sir, I follow your trend of thought.

(The Court) Now, as it presently reads, it would indicate that it should be excluded on highest and best use.

(1076) And it is not your intention to exclude that on highest and best use?

(Mr. Liotta) Well, if you are talking about the lease, but as far as the Woodmen agreement, it is my intention. As far as the lease, itself, is concerned, as I said before and respectfully said, it is our position that that lease was admissible only for the purposes of possibly indicating highest and best use.

Now, in this particular case, these defendants have utilized this lease and this Woodmen agreement and have found their values through it.

Now, what does that bring out? That brings out (1), in my opinion, a false standard of value unrelated to the highest and best use; (2) they brought in time and time again the fact that they were going to go ahead and do this thing if it was not for the United States.

I submit they are not entitled to compensation for the frustration of their plans and that has been throughout this case.

(The Court) But bear in mind, the method used by Mr. Kolb and by Mr. Mack, is that they used the capitalization, don't they?

(1077) (Mr. Liotta) They use it as an indicia of value on a building that was not there, yes.

(The Court) Now, that is for the jury to determine. That is, as the Court sees it. Because everyone in this case agrees that the lease and the sale leaseback has been introduced to show the highest and best use.

(Mr. Liotta) Your Honor, I do not agree that the sale leaseback should have been used for the highest and best

use. I objected right down the line. I never agreed to the sale leaseback under any circumstance.

(The Court) The record will reflect that.

Mr. Yochelson?

(Mr. Yochelson) Your Honor, I think the very comment of the Court has made reflects my thinking. I am fearful that this instruction, if given as requested, would direct the jury to do that which we hope they would not do, to ignore completely the highest and best use of the property.

The language "any opportunities of the landowners." They are asking to ignore that. This is one of the things that existed as of the date of the taking. This is not a speculative or hypothetical building. So far as frustration of personal plans, if Mr. Liotta means loss of future profits, there is no (1078) evidence of it. I submit on that basis, the instruction is improper. It is not right to instruct the jury on something on which there is no evidence.

(Mr. Liotta) Before Your Honor rules, may I say one other thing, sir?

(The Court) Yes.

(Mr. Liotta) Your Honor, they have time and again mentioned the fact that these defendants would have gotten \$66,000, over and above the Woodmen of the World commitment and the price they would have to pay if, in the event the property sold for X amount of dollars as their rights and interests.

Further, Your Honor, in my withdrawing my objection to the admission of the lease, I understood Your Honor's ruling to indicate that this would be admitted for the purposes of highest and best use. During the course of the trial as I respectfully stated before, it has been admitted for the purposes of showing value.

Under those conditions I would like the record to reflect at this time that I feel that a proper instruction very definitely curtailing the use of this lease must be given,

and if not, I would like the record to reflect that I withdraw my consent heretofore given (1079) for the admission of the government lease into evidence.

(The Court) The Court is going to give the instruction because the Court is of the opinion that it is the law. However, the Court is going to give the instruction "The jury is instructed in their consideration of the fair market value."

(Mr. Liotta) How was that modified, sir?

(The Court) "The fair market value." In their consideration of the fair market value.

(Mr. Liotta) That in their consideration of the fair market value no allowance shall be given.

(The Court) Yes, "no allowance shall be given."

(Mr. Yochelson) May I note an objection, if the Court please.

(The Court) Yes.

(Mr. Liotta) We withdraw our objection on that basis.

No. 7—the defendants have agreed.

(Mr. Yochelson) Yes, sir.

(Mr. Liotta) No. 8, the defendants have objected as I understand it.

(Mr. Yochelson) Yes, Your Honor, we have.

(1080) (Mr. Liotta) I think this is the law, Your Honor, "No value should be given nor allowed to the property owners caused by the expectation that the government intended to condemn the property."

It also provides that the jury may not consider the enhancement of the award to the owners. And again by virtue of the special value of the property to the condemnor for the use to which it has been put or will be put.

I respectfully submit that that is the law which we have been relying on.

(The Court) Mr. Liotta, it may be the law. But does it apply in this case?

(Mr. Liotta) Yes, sir, I think so.

(The Court) Where is the evidence?

(Mr. Liotta) Well, they have taken, I say, again, the lease, which is reflected of a need of the United States in according with Mr. Rankin's testimony, and they have utilized that as an indicia of value in this case.

(The Court) But you are not talking about that, are you? Aren't you talking about eminent domain?

(1081) (Mr. Liotta) Of course, on the first portion, maybe so. But in the bottom "Neither may you consider as an enhancement of the award to the owners any gain to the taker by virtue of the special value of the property to the condemnor for the use to which it has been or will be put."

I think this hits right square on this case. Of course, the first portion does refer to the possibility of condemnation. I think it is just general law.

(The Court) But the point is, that it may be extremely important in this case.

(Mr. Liotta) In so far as these defendants' allegations are concerned, yes, sir.

(The Court) Because the jury may interpret it as meaning that the owners bought the property with knowledge of condemnation.

(Mr. Liotta) Of course—you are referring now to the first paragraph.

(The Court) Yes.

(Mr. Liotta) Well, of course the question of any sales after January 2, 1963 were excluded by the Court, and as to the first portion of the particular (1082) instruction ending

with the word "property," I would have no objection, if Your Honor strikes that out.

But the second portion goes to the very nub of the case—"neither may you consider as an enhancement."

If you revise this to say "The jury is instructed that they may not consider as an enhancement of the award to the owners any gain to the taker by virtue of the special value of the property to the condemnor for the use to which it has been or will be put." I think that will cover the subject.

"Likewise you will not include in your estimate of the market value any increase in general market values occurring after the date of taking."

I would have to modify January 2, 1963—the date of the public announcement of the FBI project.

(The Court) It will be denied as written. You may note your objection.

Then No. 9.

(Mr. Yochelson) Your Honor has already commented on No. 9.

(Mr. Liotta) As I understand it, Your Honor is going to modify that, and I have objected to your modification.

(1083) (The Court) Yes.

(Mr. Liotta) No. 10. The defendants advise me that No. 10 is all right and they accept it.

No. 11, they advise no objection.

(The Court) Wait just a moment. No. 10.

(Mr. Yochelson) No, Your Honor. I am sorry. Mr. Liotta—

(Mr. Liotta) I am mistaken.

(Mr. Yochelson) Yes, I think so. We did note an objection to No. 10.

(Mr. Liotta) I am sorry. No. 10 they objected to.

(The Court) If they did not, the Court would be surprised.

(Mr. Liotta) This just goes to everything in which I have previously argued. Do you want to hear any more from me?

(The Court) No.

(Mr. Yochelson) If the Court please, what No. 10 tells them in substance, is that they cannot consider the highest and best use of the property. It says in express language "The prospective or speculative value of the land," and so on.

(The Court) Wait. We may be able to (1084) clarify it because the Court has granted the instruction, Mr. Liotta, down to "The prospective or speculative value of the land from possible improvements or prospective uses cannot be considered by you." Now, the Court has stricken out from there to the end of the instruction.

(Mr. Liotta) You have stricken out "from the prospective or speculative value of the land," and so on to the end?

(The Court) Yes.

(Mr. Yochelson) We have no objection to that.

(Mr. Liotta) Does Your Honor wish to hear from me on that?

(The Court) No, I think it is the same argument.

(Mr. Liotta) May my objection be noted for the record, then?

(The Court) Yes.

(Mr. Liotta) No. 11 they consented to.

(The Court) Defendants consented?

(Mr. Liotta) Yes.

No. 12 my notes indicate they consented to.

(1085) No. 13 they objected to. I might say on this one,

Your Honor, that the evidence of reproduction and so forth is secondary, and that the best evidence is the market transactions and that the jury should be instructed to first consider the market transactions before they consider any type of capitalization or any type of reproduction.

As a matter of fact, as to reproduction, I have a further instruction on that, No. 14 and No. 15.

(The Court) All right, Mr. Yochelson?

(Mr. Yochelson) Our objection goes to the use of the language, if the Court please, in the next to the last sentence, next to the last line where the jury is constructed "you will consider only a valuation based on such sales, and you will not consider in any way the reproduction cost estimates of value."

(The Court) Wait. Where are you starting?

(Mr. Yochelson) 3rd from the bottom line, if the Court please. The jury is instructed in this language: "You will consider only the valuation based on sales."

Now, this is a direction to them that if there are sales that this is the only valuation they may consider. Of course, this is not the law.

(1086) (The Court) Well, you agree with that, do you not?

(Mr. Liotta) No, sir.

(The Court) "You will consider only the valuation."

(Mr. Liotta) If there is sufficient market, and in this case I respectfully submit there is.

(The Court) Now, what case do you have? The Court quite thoroughly agrees with you that first the jury can consider, but is there any law saying that that is the only thing they can consider?

(Mr. Liotta) I think so. The Mamie Riley case, 246 Fed. 2d, 641, one of the reasons the case was sent back was because the government appraisers considered this reproduction method rather than considering or attaching the weight

the appellate court thought they should have attached to the sale of the property.

(The Court) But the Court has never said to a jury that "You consider first the comparable sales," have they not?

(Mr. Liotta) Well, another case—

(The Court) But they do not say then "But don't consider the secondary evidence that has been submitted."

(1087) (Mr. Liotta) Your Honor, in the Benning Housing Case—the citation, I think I have here—the Court excluded any reproduction of cost.

In the Toronto Navigation Case they again go into this question of reproduction of cost. I respectfully submit that unless there is a positive showing by these defendants that **a reasonable and prudent person would reproduce this property new at the time of taking, that the reproduction cost should not be considered by the jury. They have not made** any such showing.

(The Court) The Court will strike out "You will consider only the valuation based on such sales, and you will not consider in any way the reproduction cost estimates of value."

That will be stricken.

(Mr. Liotta) May my objection be noted for the record?

(The Court) Yes.

Now, 13.

(Mr. Yochelson) Excuse me, if Your Honor please. If Your Honor strikes out the last portion of Instruction No. 13 tendered by the government, you will leave an incomplete sentence.

(The Court) I do not intend to read any of these.

(1088) (Mr. Yochelson) Very well. I was under the impression that Your Honor might and I wanted to make sure about this.

(The Court) Because most of the government's instructions are already included.

(Mr. Yochelson) In what Your Honor has already prepared.

(The Court) Yes, but the Court does not intend to take the government's instructions from here and read them as they are written.

(Mr. Yochelson) Very well.

(Mr. Liotta) Defendants state they have no objection as to No. 14, Your Honor.

(The Court) All right.

(Mr. Yochelson) Yes.

(Mr. Liotta) They state they have no objections as to No. 15.

No. 16, I am sure they object to, Your Honor.

(Mr. Yochelson) Yes, Your Honor.

(The Court) We have now 14.

(Mr. Liotta) 14 they had no objection, and 15 they had no objection.

(The Court) Wait just a moment now. 14 and 15. Now 16?

(1089) (Mr. Liotta) 16 they do object to they advise me. I might say this goes to the very nub of the case, Your Honor.

I would just briefly argue that there has been evidence here of a sale of the same property, free of any element of any kind of coercion, compulsion or compromise, and defendants have agreed it was a free and open sale, and that under the case cited below, in fact, in *Baetjer vs. United States*, specifically, where certiorari was denied, and the Court said—and not quoting—the sale of the best property is the best evidence of market value.

If there is no sale, sales similarly comparable on an open market, is the best evidence. This sale, I submit, was ten months before the taking in this case, and I respectfully request Your Honor to grant this instruction.

(The Court) Mr. Yochelson? Now we are speaking of No. 16—"The jury is instructed that a sale of the same," right.

(Mr. Yochelson) Yes, sir.

Mr. Liotta has correctly pointed out to the Court that this is very basic, both to the contentions of the government and to the contentions of (1090) the property owner. We feel very strongly that, if this instruction is given,—the property at the time it was sold for \$1 million in our judgment was not the sale of the property for a number of reasons as the property condemned by the government. It did not have a lease. It did not have plans for its renovation. It did not have a permit for renovation. It did not have work already started on it. It did not have a great many factors. So, I submit that the circumstances have so changed that you are not talking about the same thing.

To give this instruction would be tantamount to saying to the jury, "Just consider this and consider nothing else." This would be dreadfully unjust to us.

(The Court) The Court recognizes the importance of this particular instruction and the Court, having had the pretrial rulings of the argument and listening to the evidence in this case, there is no question in the Court's mind that this instruction should be given.

(Mr. Yochelson) May we have an objection?

(The Court) Yes. That is predicated on the fact that the Court is of the opinion that the sale of the property in question, that is, the purchase of this particular property—and I think Mr. Yochelson will agree (1091) that the Courts have said time and time again that it is the best evidence.

(Mr. Yochelson) If there are changing circumstances.

(The Court) Now, the Court has allowed the property owners to introduce the change in circumstance over the strong objection of the government.

So, therefore, the Court is of the opinion that what is good for the goose is good for the gander. So that you have to take the purchase price along with your lease and along with your sale.

(Mr. Yochelson) I understand that and I do not object to the jury's considering it nor do I object to the Court's instructing the jury that they should consider it in the light of such changes and circumstances as have occurred.

(The Court) Well, there is no question that jury on the entire instruction, certainly is going to be told that.

(Mr. Yochelson) I think they should be told that in connection with this instruction.

(The Court) You will have the opportunity of objecting later.

(1092) (Mr. Bernstein) May I make a suggestion, since the jury is not here? Otherwise I would not get up. But would it not be fair to say that it is the best evidence provided that in your judgment there have been no changed circumstances since the time of the original purchase? That then leaves to the jury whether the circumstances have so changed the situation as to no longer to make it the best evidence.

In other words, I think you have to pose for the jury their alternative: This is the best evidence providing you do not find a change of circumstances. Now, that is for you to decide. But otherwise, you are instructed as a matter of law—this is the best evidence, and you do not consider the change in circumstances?

(The Court) The Court will grant the instruction. The Court will give the instruction.

No. 17.

(Mr. Liotta) I will withdraw that.

(The Court) All right.

(Mr. Liotta) No. 18 goes to the quotient verdict.

(The Court) Any objection?

(1093) (Mr. Yochelson) No objection.

(Mr. Liotta) No. 19 goes to the jury view.

(Mr. Yochelson) No objection.

(Mr. Liotta) And No. 20 goes to assessments, Your Honor.

Whether you give this or not—

(Mr. Yochelson) No objection.

(The Court) Didn't we give that at the beginning, too?

(Mr. Liotta) I am not sure, Your Honor, to be honest with you.

(The Court) The Court was of the opinion that I told the jury not to make any inquiry as to assets, or taxes.

(Mr. Liotta) I cannot say, Your Honor.

Then of course we go to No. 21, and our No. 22 and our No. 23. The defendants object to our No. 21 which refers to a request that the jury disregard the testimony of the defendants' appraisers for the reasons therein stated. I think Your Honor's ruling, I take it then.

(Mr. Liotta) No, sir, not in the least.

(The Court) All right. I am denying it.

(1094) (Mr. Liotta) May my objection be noted, sir?

(The Court) Yes.

(Mr. Liotta) No. 22 goes to the Woodmen of the World commitment. Your Honor has also heard from me on that.

(The Court) That will be denied and your objection is noted.

(Mr. Liotta) No. 23 goes to the question of the lease.

I think this is a little different, Your Honor, than the ones that you previously denied, in that I am pointing here to the fact of Your Honor's pretrial ruling that the evidence could be admitted only and solely for the purpose of being indicative of the highest and best use of this property.

Further, that the mere fact that this lease was entered into does not necessarily indicate the highest and best use, and they are not to consider it as an absolute criterion of the highest and best use. And that in the event it is not shown to their satisfaction that there was a demand in the general market for office space, exclusive of the Government of the United States, that they are to disregard said lease as an indication of highest and best use.

Further that under no circumstance are they (1095) to construe this lease as being indicative of value in that it refers to an office building to be constructed in the future, possibly, and has no relationship to the property as it existed on the date of taking.

(The Court) What do you say about this, Mr. Yochelson?

(Mr. Yochelson) We object most strenuously to it, if the Court please.

Our objection is based on—

(The Court) I do not know that you are objecting too strenuously to it, are you?

(Mr. Yochelson) Well, portions of it are all right. But portions are quite prejudicial, we feel.

For instance, they instruct the jury that "If you find this lease was a result of a special and urgent need of the government, you are to disregard it." There is no evidence this was of a special and urgent need, other than a need for office space which exists in every situation where a lease is entered into.

I submit nobody entered into a lease without a need. I just do not think that the evidence supports this kind of an instruction.

(The Court) It is going to be denied, as written.

(1096) (Mr. Liotta) May my objection be noted for the record?

(The Court) Yes.

The Court is of the opinion that under the general instruction to the jury, all of the evidence that has been received is for them to evaluate: That the lease being introduced for its highest and best use, they may disregard entirely.

In the sense that they may say it is far better monetary sense if they used it for some other purpose, there would be a greater return. So that they are the ones that are going to weigh what weight they will give to the testimony.

Now, we are introducing it for what the property owners say is the highest and best use.

All right, gentlemen. Are you ready?

(Mr. Yochelson) The Court please, I do not like to belabor No. 16, but I would call Your Honor's attention again to it. Of course it is my opinion that No. 16 is tantamount to instructing the jury that they must consider what was paid for this property as being the best evidence of its market value. Now, this would indicate that it is the best evidence of market value (1097) regardless of whether or not the jury considers that it was sold too cheap, or whether the jury considered it was sold too high. Ordinarily, it may be, and the Court says, "Ordinarily it is the best evidence if there are no changes in conditions," I would have no objection to it. But as it is, the Court says to the jury that this sale for a million dollars must be accepted by you as the best evidence of the market value of this property, and it takes away from the jury its fact-finding function.

(The Court) But you are isolating it, Mr. Yochelson. You are isolating the instruction.

(Mr. Yochelson) It seems to me this is the instruction they will have: "You must consider this as being the best evidence of the market value of the property, disregarding

completely its market value arrived at by the capitalization return method or by any other method." You are saying that this is the best method.

(The Court) Now, what is your suggestion as to the change?

(Mr. Yochelson) "The jury is instructed that ordinarily,"—insert the word "ordinarily" after the word "that," and before "a sale."

And add after the words "market value," this, (1098) "If there are no changes in conditions."

(The Court) Where?

(Mr. Yochelson) After the words "market value," the last word of the sentence.

(The Court) And then the next sentence, "If there is no such sale, then the jury is instructed that sales of similar or comparable property are the best evidence.—reasonably near in time."

(Mr. Yochelson) Yes, reasonably near in time, and comparable in size and area or some such thing. But not necessarily that a sale of a small piece would be comparable.

(Mr. Liotta) I can add nothing further than what I originally stated in my written argument.

(The Court) The Court is going to grant it with the changes "ordinarily."

(Mr. Liotta) And the other change would be—

(The Court) "And if there is no change."

(Mr. Liotta) May my objection be noted to the changes as made by Your Honor at this time to government's instructions as submitted, No. 16.

(The Court) Yes. It will be so noted.

It is now 10 minutes past 11.

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MR. YOCHELSON IN ARGUMENT TO JURY

(1128) Now, I submit to you that both Mr. Throckmorton and Mr. Savage, who were brought here by the government, gave their testimony of value, reached their judgments and their opinions, tentatively, they say, on the basis of taking what they saw.

They saw this old abandoned warehouse building, and this is what they appraised. They did not follow what a competent appraiser would follow, that is, they did not determine what is the highest and best use of this property. Very frankly, they appraised it as they saw it. Why, I don't know.

Initially both of them sought to steer clear of the government lease. Mr. Savage initially, when he was asked—did he know about the government lease, said, "I heard about it." Then in an effort to impress you with the fact that he did more than hear about it, he admitted that he had seen it and he admitted that he had read it.

Now, I want to revert to my brief, and to the facts that I think should convince you as reasonable and honorable men, that this property was in its highest and (1129) best use as an office building location, which was partially built, already in the course of construction as an office building and not an abandoned warehouse.

Now, there were two reasons assigned by Mr. Throckmorton and Mr. Savage as to why they did not consider this as office building property. (1) The building might never be completed and (2) the building might never be rented. Those were the reasons you heard.

Now, with respect to reason No. 1, I submit that their whole thinking is fallacious, that this building was then and there committed to be built, that plans had been approved, that a permit had been issued, that work was already in progress and more than that, the owners of the property then were under or had given a bond signed by a surety company, guaranteeing the completion of the building. So, I say to you that the one reason that Mr. Throckmorton and Mr. Savage gave to you as not render-

ing this property suitable for office building considerations must be eliminated.

There was then no question that this building would be built, but for its taking by the United States, it was committed to be built, and a bond by a corporation—a corporate insurance company had been (1130) furnished to insure that building.

In addition to that, under the very lease with the United States of America there was a penalty of \$1,300 a day, I think, if the building were not completed by the date that it was required to be completed under the terms of the lease.

Now, the second reason that they did not consider this as an office building property, is that it might not be leased.

Gentlemen, how in the name of anything sacred can they say that it might not be leased when it was leased?

Now, true, it was not leased for 45 years and it was not leased for 50 years, but it was leased for five years.

The evidence is that even in the brand new 12th and E Street Smith Building they were willing to rent the third to the 12th floors under a five-year lease. So, having shadowed the reasons for not considering it as an office building site, I suggest to you that what they were doing was purely figurationing. It did not aid you because it was not based upon a sound root and (1131) anything that grew from it was merely weak.

What other reason did they assign that this was not a good office building site and should not be considered for that use? E Street they said had not yet arrived. E Street had not yet arrived. It was not ripe.

Go with me, please, on E Street. You, as jurors, have a right and duty and obligation to use your own judgment, your own intellect and your own knowledge to temper this testimony and to weigh it and see what it does to you and for you. Go on E Street with me, if you please. Come from 14th Street and go East. What do you have but

office buildings? 14th and E—the Munsey Building, 13th and E, the Warner Building—13th and E, the Pennsylvania Building, 12th and E, the Smith Building; 11th and E, the Perpetual Building Association Building; 10th and E, the PEPCO, Potomac Electric Power Company building; 8th and E, the U. S. Civil Service Building. The only block on E Street in which there is not an office building, and I submit a fine office building is 9th Street. 9th Street in accordance with the words of your own testimony, and I think you know 9th Street as well as I know 9th Street, is a blighted street and has been a blighted (1132) street.

What is on 9th Street. If you are interested in seeing nude movies, go to 9th Street. But not for office buildings, because there are none on 9th Street.

And if you are interested in the sales they give you on 9th Street, in preference to sales on E Street, consider 9th Street. 9th Street does have this depressed attitude and the public does not like 9th Street as is reflected by the failure of developers to develop 9th Street. But not E Street. E Street Completely from where it is from Pennsylvania going east beyond this property as a fully developed—now—office building location on which are located nine office buildings.

So why, then, is this not an office building site?

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(1135) Now, I want you to consider further, and I submit to you that it is a fact, that what the government condemned on January 18, 1963, was not—I repeat—was not a Dicker-Lawrence purchase some months earlier. Because by the exercise of their skill, by the exercise of their experience, their ingenuity, their knowhow, their willingness to risk, they converted that property.

How? They interested the government in leasing the property and the government did lease the property for \$389,000 a year. You are businessmen. You are property owners. Is \$389,000 a year a fair return on a million dollar property? You cannot buy a million dollar property

and get that kind of return each year. That is 38 per cent of a million dollars.

(1136) Secondly, before the United States of America entered into this lease, they were bound by the terms of a so-called Economy Act, and under the terms of that so-called Economy Act, they could not pay, as Mr. Rankin testified, a rental in excess of fifteen per cent of their appraised value of the property.

You figure it out.

So, was this property the same when taken? It was not in that respect. It was not in the further respect—and I do not care what Mr. Liotta tries to tell you about the Woodmen of the World, or the Woodmen of the World Commitment—I think you must be impressed, as I was, that Mr. Hendrickson—this gentleman who has nothing to do with any of us and no relation and no association, no nothing—came to us out of the Midwest at the request of the Court and counsel to tell you the facts of this situation.

What did he tell you? First, he told you that he looked at the site and he thought it was a fine office building site.

Now, this is an independent—and I submit—intelligent, because he is the assistant manager of an investor of \$250,000,000.

(1137) He is not a country bumpkin. He said this was a fine office building site. I want you to be clear in your thinking.

The Woodmen of the World did not assign to this building a 25-year life. Mr. Liotta said that. I think Mr. Liotta is honestly in error. They did not say that.

They said that the proposal that they buy this building came to them from a person, a broker named Bell, a District of Columbia Broker, and this was the proposal that they buy it on the basis of a repayment in 25 years.

This does not establish their determination of the reasonable or economic life of this property any more than does

the fact that a mortgage you may have on your property requires that you repay it in ten, fifteen or twenty-five years. That does not establish the life of the property. The only thing it does, it establishes the period within which the maker of the mortgage wants his money back.

So, I submit to you that when you start considering what it was that the government of the United States acquired by condemnation in this case, they acquired a situation completely different in every respect. At the time that this property was purchased it had no lease with (1138) the government. At the time this property was purchased, it had no commitment for sale and leaseback with Woodmen of the World. I want you to know, and you will be given in evidence all of these exhibits, including the lease and sale leaseback. This sale leaseback with Woodmen of the World is a firm and binding agreement for which \$14,000 was paid. The part—the only part of the Woodmen of the World commitment that is flexible is the price that would be paid. Either the Woodmen of the World would pay \$2 million 800 thousand for this property, or such lesser amount as the property would appraise at when completed.

* * * * *

(1139) If you want to test that difference, I ask you to do what Mr. Liotta asked you to do—you put yourself, as he asked you to do, in the position of a buyer on January 18, 1963. An investor or buyer, that is, if someone came to you and said, "I have here 35,000 square feet of ground, zoned C-4, in the heart of downtown, on E Street—which from 14th to 8th and further, proved by the number of office buildings I gave you, "I have a firm five-year lease with the government of the United States from which you will receive \$389,000 annual rental; I have a commitment from the Woodmen of the World to buy this building when completed at \$2 million 800 thousand, at a return of 7.74 per year, which, after being paid to them under the leaseback (1140) provisions would give you, Mr. Investor, some \$60,000 annually in your property."

And I say, "In addition to that, I have 13,005 feet of property approximately of C-4 property on this same fine street. What would you pay for it?"

You buy income. You buy the right to make income, you put your building in a building association at 4.5 per cent or you put it in this at eight and a third per cent. I say there is utterly no basis of comparison with this property on the date of taking and on the date that those people bought it from Mr. Newbold and his Merchants Transfer and Storage Company.

Now, they had no assurance that they could get a government lease. But the ingenuity did it. They did more than that. Before they could get the government lease, they engaged engineers, engaged architects, and I want you to look at these plans when you go into your deliberations in the jury room. This is not going to be a windowless monstrosity or a suicidal building, and maybe I should apologize to you because Mr. Scharf said it was not safe to put more than five people on that second floor, and I did not realize that when you and all of (1141) us, when we viewed the premises, we were taking our life in our hands.

I want you to look at this. This is one of the things the owners had to do. I submit to you that when you see it, it makes one fine office building connected with a series of overpasses crossing this alley, so that it was in substance, one fine—you can come to your own conclusion as to whether or not it is fine or not. I think it is fine but this is going to be your conclusion.

I want to say not only did they have to get the engineer and architect, they processed that through the District Building, they got the permit, they negotiated with the United States and they got the lease.

They got the completion bond, and they started to work.

Now, I want to confess to you, frankly, that in this relatively long period of time, there have been times when I have been sorely confused and confounded, because I was

not sure what it was that the government was contending. It is the Government of the United States seeking to acquire this property, or rather having (1142) it and now seeking to have this established as a fair market value for it. It is the Government of the United States through its witnesses who say to you that it was suicide to make of this an office building.

Who said it was an office building? The Government of the United States. Why do I say that? They agreed to rent it for an office building for five years at a rental of \$389,000.

Who approved these plans? The Government of the United States.

Who had the appraised—who had the appraisal before they signed the lease? The Government of the United States.

Who signed the lease? The Government of the United States.

Now, this same Government of the United States comes to you and says, "Pish posh, think nothing of it. Don't give any value at all to our lease, don't rely upon us as telling you that this is the highest and best use for this property."

Do I assume that they do not know what they are doing on one hand and do with the other? Don't they let one hand know what the other is doing? (1143) I do not know.

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(1150) He said, "I know that the cost of reproducing or remodeling, renovating or restoring, can vary three or four hundred thousand dollars. So, I will knock three or four hundred thousand dollars off of this and I will get back my million and some odd thousand dollars.

I submit to you this is not fair, not equitable and not believable. You may have an opinion, as Mr. Kolb (1151) had that it would cost \$1,650,000 or a million six hundred seventy-five thousand to do this work. If you have and

if that is your opinion, you should be man enough to stick to it. Or you may have an opinion that it would cost \$1,350,000, as Mr. Mack had. But I suggest to you you should not have an opinion of \$1,750,000 but my opinion is not good because variances come into play and I say voluntarily, I will shave it.

Now, tell me what was going to be the cost of doing this building? You have before you some figures of people in the building business. You have others, but you have people in the building business. Why is Mr. Scharf, Mr. Scharf who believes it is unsafe for five people to stand on that section of the floor, and you have Mr. Vanneri—now I say to you that the Vanneri Company, when it came to its conclusion of what it would do this job for, did so in the open market, hoping it would get the job, and submitted this firm bid to do this work for the sum of \$1,380,000. This was not a hypothesis given for the purpose of litigation. This was a price upon which it was willing and did submit for the purpose of binding himself. In accordance with Mr. Vanneri they even believed that they had a contract and went ahead with the work.

(1152) There is no question they went ahead with the work. He brought all of those windows down, you saw the cuts in the floor and everything else that was done. So there is, I submit, more credence to be attached to this type of an estimate than there is to the type of an estimate that Mr. Scharf made, bringing in only one bid, no competition, with the previous knowledge that it was not going to be given to you anyway. Now, that was not a reliable bid, and that is not the way you get a bid in the market place that is meaningful.

So, it comes back, I think, again to this fundamental question: What was it that the Government of the United States took? What was the highest and best use? What was that worth?

What was it worth in its then rights, with all of its then rights, with the right to complete the building, the

bond, with the permit, the lease, the sale-leaseback, with everything.

* * * * *

(1158) (The Court) Let us be in order.

CHARGE TO THE JURY

(The Court) Gentlemen of the jury, it now becomes my duty as the trial judge to instruct you on the law that applies in this particular case and, of course, it is your duty as jurors to follow the law as it shall be stated to you.

Under the constitution of the United States, the Government must pay just compensation to people whose property is taken by it for public use.

The duty to be performed by you as the jury in this particular case is to ascertain the award, that is, the just compensation for the parcel of land taken in these proceedings. I say the parcel of land, meaning the buildings thereon.

Now, gentlemen of the jury, the authority of the Government to take the property involved, and the propriety of the purpose for which it has been taken, have been determined and are not in question or not in dispute in this particular case. Therefore, you will not entertain (1160) any feeling whatsoever against the Government because it took private property. On the other hand, you will not entertain any feeling whatsoever against the propertyowners because they have asked for a determination in the Court for the fair market value of the property which has been taken. All the parties, that is the Government on the one hand and Albert P. Dicker, et al, meaning "and others" are in this Court by right. They have a legal right, and they stand in complete equality in the Court. I am certain that you, as jurors will treat them all with equal treatment.

Gentlemen of the jury, it is extremely important in this case as in all cases that you must be fair. You are under a strict oath as jurors, just as the Court is under a strict oath and you must weigh and consider this case without regard to

sympathy, to prejudice or bias, for or against either party to this action. On your oath as jurors you must decide the case solely upon the facts as they have been presented in evidence and in accordance with the law as it will be stated to you.

Now, gentlemen of the jury, you are the sole and the exclusive judges of the questions of fact. In other words, you must determine what the facts of this (1161) case are by virtue of the evidence introduced before you in this trial and you must determine for yourselves what those facts are according to the evidence and from your view of the property in question without regard to the opinions of counsel and most certainly, if expressed inadvertently by word or deed, without regard to the opinions of the Court.

These parties, the Government on the one side, and the property owners on the other, are here for the resolving of their difficulties by your verdict, not by any opinion expressed by counsel, and not by any opinion expressed by the Court.

Now, gentlemen of the jury, when I say to you that you are not to be bound by the opinion of the counsel, I do not for a moment mean that you are not to regard the presentation made by counsel, Mr. Liotta in his opening statement, and Mr. Yochelson in his opening statement, and their summation. These men are officers of this Court. They are experienced in the presentation of these matters, as you perhaps have ascertained through the progress of this trial. They are well qualified, efficient, in their profession. But, bear in mind that we are concerned not by their opinions, because (1162) they are advocates. We are concerned with the evidence that comes from this witness stand.

Bearing in mind that Mr. Liotta represents the Government on the one side, Mr. Yochelson and Mr. Bernstein represent the propertyowners on the other. They are advocates for a particular party. This Court is not an advocate. You are not advocates.

This Court has the responsibility of judging the law in the case. You, as jurors, have the responsibility of judging

the facts in the case. So, I therefore, say to you that you are to be the sole judges of the questions of fact.

Now, gentlemen of the jury, as you are the sole judges of the facts, also you are the sole judges of the credibility of the witnesses. Now, that simply means that you are the judges of their worthiness of belief, and in that determination you may take into consideration their attitude and their demeanor on the stand; whether they impress you as truth-telling individuals, prior contradictory statements; their opportunity of knowing the facts and circumstances concerning which they have testified; their ability to recall such facts and (1163) circumstances concerning which they have testified; their ability to recall such facts and circumstances; their bias or prejudice if any be made manifest to you, and their interest in the outcome of the case. Then you should give to their testimony such weight as in your judgment, you deem it fairly entitled to.

Now, gentlemen of the jury, the party who asserts the affirmative of an action must carry the burden of proving the essential elements. Now, this burden of proof is established by what we call, or what the law calls a preponderance of the evidence. This is not determined by the greater number of witnesses testifying to a particular set of facts. It means that the testimony on behalf of the party carrying the burden of proof must have greater weight in your estimation, have a more convincing effect on your minds than that opposed to it.

If you believe that the testimony on any essential point is evenly balanced, so that it does not preponderate in favor of the party charged with the burden of proof, then your finding as to that point must be against the party carrying the burden of proof. The burden of proof in this case is upon the Propertyowners, (1164) that is Mr. Albert P. Dicker and others—Mr. Lawrence, Mr. Fromkin, who have the responsibility to prove by a preponderance of the evidence the just compensation or the award and fair market value of the property in question as of January 18, 1963.

Now, the word "property" as used in these instructions

includes all right and interest which are attached to the real estate, and upon which it is practicable or feasible to place a monetary value.

Now, the just compensation to be paid by the Government is measured by the fair market value of the property in question, that is, 920 E. Street Northwest in the District of Columbia, on January 18, 1963—no more and no less.

By fair market value is meant the amount of money for which the property would have sold on January 18, 1963, for cash or on terms reasonably equivalent to cash, by a seller willing but not obligated to sell, to a buyer willing but not obligated to buy.

You will not consider the lapse of time since the date of taking, nor any allowance of interest; these are matters of law for the Court alone to determine.

(1165) Now, the standard for determining just compensation is not value to the landowners for their particular purposes, nor value to the Government for its particular purpose, but fair market value. The just compensation payable by the Government is the equivalent of the fair market value of the property at the time of taking, paid contemporaneously in money. The just compensation may be more or less than the owner's investment in the property.

The owner is entitled to be put in as good a position pecuniarily as if his property or their property had not been taken by the Government, but only to the extent of the fair market value of the property on the date of taking.

Now, the jury is instructed that, in their consideration of fair market value, no allowance shall be given or compensation made for either (1) any unwillingness of the landowner to part with his land;

(2) Any frustration of the personal plans of the landowner; or

(3) Any opportunities a landowner may have lost by reason of the taking of his land.

And no consideration shall be given to and no allowance of just compensation made for (1) any inconvenience (1166) or hardship that may have been occasioned any landowner by the taking of his property; nor (2) For any interference with the business of the owner or loss of future profits that may be sustained by the owner; nor (3) for any other indirect or consequential damage that the owner may suffer or be thought to have suffered, indirectly.

Now, the jury is instructed that if any property is peculiarly adapted by its construction, improvements or intrinsic character to some particular use or uses which gives it a higher market value than it would otherwise have, the circumstance or circumstances which make up such peculiar adaptability for such particular use or uses shall be considered, and the amount awarded as compensation for the property should be based upon its fair market value on January 18, 1963 in view of the most valuable use or uses for which it is shown the property is adaptable.

Now, by the most valuable use or uses to which the property can or may be put is meant either some existing use or one which the evidence shows is so reasonably likely in the near future that the availability of the property for that use would affect its present market value and would be taken into account by a purchaser under fair market conditions.

(1167) Now the jury is further instructed that compensation to the owner is to be estimated by reference to the use for which the property is suitable, having regard to the wants of the community, or such as may be reasonably expected in the immediate future. The special value of the land due to its adaptability for use in a particular business is an element which the owner of the land is entitled to have considered by the jury in determining the amount to be paid in just compensation. However, mere physical adaptability of the property for a particular use is not sufficient without a showing by a preponderance of the evidence of a market demand for the property for the particular use for which the property owner contends the property has as of the date of the taking.

Now, just compensation is not a question of value to the owner, and on the other hand, it is not a question of value to the Government because of its need for the particular property. The fact that the Government of the United States is able and willing to pay the fair market value does not enhance the value of the property.

(1168) In determining the value of the land, meaning buildings thereon, also, you are not to consider or be influenced by the fact that these proceedings, that is, proceedings here in Court, are pending for the taking of the property. You must consider all elements for the highest and best use of the property, including the lease to the United States, the lease which has been referred to in the evidence between General Services Administration and the property owners in question, as well as to the sale and the leaseback, the sale being to the Woodmen of the World and the leaseback to the property owners, and all other elements as might influence a reasonably prudent person interested in purchasing the property.

Putting it another way, gentlemen of the jury, you are to consider that you are outside of this courtroom and these proceedings are not being held, and you are to evaluate the property on what the willing purchaser, considering the elements that have been referred to, would pay on the open market for the fair market value of the property in question.

Now, the availability of the property for use gives it a market value, and the compensation therefor to the owners is to be estimated by reference to the (1169) use to which the property is being put or for which the property is available; hence, you will determine the reasonable or the reasonably highest and best use for which the property was available on the market as of January 18, 1963.

In considering the available uses to which the property at 920 E Street, Northwest might be adapted or devoted for the highest and best use, the question is what an ordinary prudent businessman would do, and not necessarily what the landowners, that is the owners of the prop-

erty, claim or indicate that they would do. While consideration may be given to the highest and best use to which the property could be devoted or was adaptable on January 18, 1963, the fair market value is to be determined for the property as it was on that date, taking into consideration the highest and best use.

Now, the jury is instructed that ordinarily a sale of the same property, reasonably near in time, on the open market, is the best evidence of market value of the property if there are no changes in circumstances pertaining to the property. If there is no such sale, then the jury is instructed that sales of similar or comparable property reasonably near in time on the open market are the best evidence of market value.

(1170) Now, the jury has heard testimony on compensation and recent bona fide sales under fair market conditions of any lot or lots in the vicinity thereof, that is, the property in question, so situated as to have bearing upon the fair market value of the land to be condemned in this particular proceedings may be considered by the jury, and such sale or sales, that is sales contracts looking at the circumstances of each instance, may reasonably be regarded by you as evidencing or throwing light upon the fair market value of the land to be condemned, unaffected by the government's intention to acquire the properties for the public use.

I am certain that the jury recognizes that it is for you to determine from the comparable sales, the size of them, the nearness in time and the nearness in location, whether they are similar. Those are factors that you must take into consideration.

Now, there has been evidence offered here to show the value of the property based upon reproduction costs of the property. Now, reproduction costs must be predicated on what a reasonably prudent person would think of reproducing or improving of the property in question, as must be evaluated by you as to what the (1171) reasonably prudent person would do with the property in question.

You are further instructed that evidence of improvement or reproduction costs as bearing on market value is secondary evidence and may be considered in the event that the landowners have shown by a preponderance of the evidence that a reasonably prudent person would undertake the improvement or construction of the property for the figure given as improvement or reproduction cost on the date of taking.

Now, you are instructed that in this particular case where evidence of reproduction costs have been presented by a witness, the same witness must have presented evidence of the amount to be deducted for depreciation. Unless both items of evidence have been presented by the same witness in arriving at an offer of value, you are instructed that all evidence of that nature from that witness must be entirely rejected or disregarded.

Now, during the course of this particular trial, gentlemen of the jury, you have heard a great deal of testimony from what is known as expert witnesses. Now, the Court is speaking of Mr. Throckmorton, Mr. Savage, (1172) Mr. Kolb, and Curt C. Mack, all appraisers, and a person who by education, study and experience has become an expert in any art, science or profession, and who was called as a witness, may give an opinion as to any such field or expertise in which he is skilled or versed and which is material to the case in question. You should consider such expert's testimony, considering his opinion and should weigh the reasons given for it. You are not bound, however, by such opinion.

In this case there has been conflict in the testimony of expert witnesses concerning the fair market value of the property in question. You are, of course, not to be swayed by the fact that in this particular case, as the Court recalls, there were the two witnesses for the government and two for the property owners, and then I believe that one, Mr. Savage, testified in rebuttal, but you are not to consider numbers or the time that they spent on the stand as determining, the determining factor. Because you must, in the final analysis, evaluate their testimony in the same light

as you evaluate the testimony of other witnesses. In other words, it is your exclusive duty and obligation.

(1173) Now, bear in mind, gentlemen of the jury, that when these witnesses get on the stand, they tell you about the different organizations that they belong to, the positions which they have held. I am certain that you understand that they are not bragging in any sense. They are asked these questions in order to show to you their qualifications, their experience, their training, their expertness in a particular field. Then they give an opinion. As I have told you, you are not bound by that opinion.

But bear in mind, gentlemen of the jury, that the reasons on which that opinion is predicated is the determining factor so far as you are concerned. In other words, weigh carefully the reasons given for the opinion, and then evaluate the testimony which they give.

Now, the jury is further instructed that you, in this particular case, shall not render what is called a quotient verdict or a verdict arrived at by chance or lot. Therefore, gentlemen of the jury, under no conditions—and I am certain that you would not do it anyway, even if you were not so instructed—that you should not agree that each juror shall set down some particular figure, some sum and then divide it in any (1174) way, because it is what is known as a quotient verdict, and we are all opposed to that—counsel for both parties, as well as the Court itself. Because you are expected as jurors, after listening to the testimony that you have been listening to, that you, each of you form your own opinion, and that in your deliberations, you will state your opinions and the reasons therefor, and you will have at your disposal all the exhibits that have been introduced, and then from an intelligent discussion of all of the facts in the case, that you will arrive at a fair and impartial verdict, awarding just compensation for the property taken.

Now, the jury viewed the property involved in this case and your view is part of the evidence herein. However, you must determine the fair market value of the property

in question as of January 18, 1963. The Court, recognizing that you saw the property just recently.

The jury are instructed that the law requires that the jury view and examine the property which is sought to be taken and this not only enables the jury to see for themselves the nature, the character, the section and general surroundings of the property so that they may (1175) intelligently follow the testimony of the witnesses, but it also enables the jury to form its own opinion and judgment as to the questions you are now called upon to answer.

You shall take into consideration the opinions and testimony of all of the witnesses, the opinions of the expert witnesses, as well as their reasons therefor who have testified and give to such testimony the weight to which you think that witness' testimony is fairly entitled to. But you are not restricted to a mere consideration of the evidence adduced by the parties. You may exercise your own power of judgment, common sense, and deductions from the testimony as given to you, in your observations, as well as arriving at your opinion.

You must, however, confine your deliberations to the evidence that has been offered, and to your own judgment, based on the view and on the inspection of the property.

You are the sole judges of the credibility of the witnesses, and you are the sole judges as to the weight that you are to give.

Now, what the Court actually indicates to you is that you are expected—and I know that you will—confine your deductions to the view and to the evidence which (1176) has been submitted in court. You are bound by that. You may not go on your independent judgment outside the scope of the evidence which has been submitted.

Now, I believe that the jury has been told that you are not interested in the assessed value of the property if you do happen to know. For the taxes, if you should know what the taxes are. This is not part of the evidence and is not to be considered by you.

Gentlemen of the jury, we will make available for you if you should so request, the transcript of the record as well as instructions given to you by the Court and in the event that you have need for them, you may notify the Marshal, who will notify the Court.

Your verdict in this particular case must be in writing, subscribed to by the jurors, and not less than three jurors concurring. In other words, three jurors of the five must concur therein, in the verdict which will be rendered. It must set forth the compensation to be paid for the taking of the land and the buildings, and a written form is to be used by the jury in returning the verdict, and that form will be furnished to you by the Clerk of the Court or by the Court.

(1177) Now, I want you to consider—the Court feels this is not really necessary to tell you but I want you to consider this matter deliberately, carefully and thoughtfully, using the same approach, the same intelligence and the same common sense that you would employ in determining any important matter in your own life or in your own affairs.

Bear in mind that this proceeding is extremely important to the government, and bear in mind that this proceeding is extremely important to Mr. Albert P. Dicker and to Mr. Lawrence and to Mr. Fromkin and it is their day in Court. So give to this matter the same careful consideration that you would give if you were here as a property owner, or if you were here in any other capacity as a litigant.

As I have said before, gentlemen of the jury, your verdict in this case must be in writing, signed by you. You will have the evidence in the case.

Now, gentlemen of the jury, the Court has not commented on the evidence in this case because that is your field. The Court, having heard the testimony, has tried to outline to you certain guidelines that should control.

(1178) As the Court understands the testimony in this case, the government contends that on January 18, 1963,

which is the date of taking of the property in question, that that property was appraised by two appraisers, and it was appraised as far as those two appraisers were concerned, Mr. Throckmorton and Mr. Savage, for a printing plant in the rear. You remember the testimony, and for a discount house in the front and for other purposes, and that as of the date in question that the fair and reasonable value of the particular property was "X" dollars, which you have heard the testimony and the Court will not try to recall whether it was a million-one or a million-four or what the testimony was. But that their appraisal of the highest and best use was for those purposes. There was a great deal of testimony submitted to you.

The Court further understands that the government contends that it is not suitable for an office space or office building even though the government did rent the premises in question. But if an office building were built on the premises that it would not be a financial and successful operation, because there is no market for the office building at that particular locality at this time.

(1179) Now, this was testified to by the experts in the case predicated on comparables, comparable sales in the locality, on, as the Court recalls, reproduction costs as well as on rebuttal on income.

Now, so far as the Court is concerned, it is not commenting on the evidence. The propertyowner, on the other hand, contends, as the Court understands it, that he bought the property in March of 1962, and they paid a certain amount for it; that as of January 18, 1963, that property was not the same property that he had purchased. It was not the same property because he had entered into a lease with the Government, and that the highest and best use for that property was shown by the lease which the Government entered into and that that lease was entered into sometime in August, as the Court recalls, in 1962, and it was sold. That is, plans were drawn, approved, and architects were employed.

You heard Mr. Venneri testify as to what part he played in that—costs of the building; you heard what Mr. Venneri

said about costs of the building. Those are the factors you must consider. But the contentions that the property owners say to you that it is not the same (1180) property that they purchased, as the Court understands it, and that an office building was the highest and best use, and the office building, when built, would be leased to the Government for a five-year period. But even if it were not leased more than the five-year period, because, in the lease there are options, if it were not leased for more than a five-year period, it would still be an income-producing property and warranting the expenditure of the one million three, one million-eight or one million seven, whichever you decided was to be the amount spent for the building of the building, that it would still be reasonable and practical and would what a reasonably prudent man would do.

Now, as I say, that is the contention of the propertyowners and that he sold this lease to the Woodmen of the World and he took the lease back on a lease. Those matters are in evidence. They can be minutely inspected by you if you should so determine. But these are the respective contentions, and they are wide apart. They are supported on both sides by evidence, and it is your obligation and your duty, and it is not an easy obligation and it is not an easy duty for you to perform, that you must take into consideration the testimony and the conflict in the testimony and weigh it carefully and (1181) from that testimony you must resolve the differences and you must arrive at what you consider to be just compensation to be awarded by the Government to the propertyowners in question, and I know, gentlemen of the jury, that you will give that matter just consideration.

So, the responsibility in this case is now in your hands.

Is there any particular instructions requested?

(Mr. Liotta) May we approach?

(The Court) Certainly.

(1182) (At the Bench)

(Mr. Liotta) I would like incorporated as part of my

objections at this time, the objection to Your Honor's instructions.

(The Court) That will be reflected by the record.

(Mr. Liotta) And request that it be set forth as if I made them right now.

(The Court) All right.

(Mr. Liotta) I would object to the instruction again very vigorously that the Court gave in reference to the Woodmen of the World and the lease. I submit to Your Honor, that the effect of that instruction at this time was to tell the jury that they must consider the Woodmen of the World agreement and the lease as an evidence of value in this case.

I further except to your Honor's comments on the evidence on the basis that I feel now that the jury will take the position that all of these agreements and all of these factors were definite, positive indicia of value, and that Mr. Savage and Mr. Throckmorton valued this property not in consideration of what they thought the (1183) highest and best use was, but some inferior use. I submit that they felt this was positively the highest and best use of the property, that they gave it the ultimate in value. I feel that at this point the jury can no longer differentiate and that we have been greatly prejudiced and I object to it.

(The Court) Anything further?

(Mr. Liotta) I would request Your Honor to instruct the jury that the Woodmen of the World agreement and the lease were not absolutely positively criteria of highest and best use; that the Government is not the general market, and that the appraisers for the Government presented this case on the basis of what they considered the highest and best use.

(The Court) All right, the Court will not reinstruct on that point.

(Mr. Yochelson) We have nothing further than we have heretofore stated to the Court.

(The Court) All right.

(Mr. Liotta) I might say, too, Judge, that I would further like to emphasize my objection to your Honor's instructions as to the sales admitted in evidence and the comparable sales. I believe the qualification, Your Honor attached to that requested instruction (1184) effectively puts the jury in the position of having to disregard the sale of the subject property altogether. I object to it.

(The Court) All right. The record will so reflect.

* * * * *

MOTION FOR NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE

Albert P. Dicker, David Lawrence, et al., the Property Owners, respectfully move for a new trial under Rule 60 (b) of Rules of Civil Procedure on the ground of newly discovered evidence, and in support thereof, say:

1. This was a condemnation proceeding involving the taking of private property for public use in the exercise by the United States of its sovereign power of eminent domain and the payment by the Government of just compensation under the Fifth Amendment. The general area taken by the Government for the new Federal Bureau of Investigation building included two square blocks of real estate in the central business district (Tr. 626) between Pennsylvania Avenue on the south and E Street on the north, and between 9th Street on the east and 10th Street on the west. The property taken for public use in this case was known as 920-922 E Street, N.W. and included 35,134 square feet of land improved in part by an 8 story brick building on E Street and a 6 story building in the rear.

2. The trial resulted in a jury award returned on April 1, 1964. The Owners filed a timely motion for a new trial on the ground of alleged errors of law which, after hearing, was denied and judgment was entered on the award on 1964. The Owners entered an appeal to the Court of Appeals on July 2, 1964. By order dated

August 7, 1964, the District Court extended the time for forwarding the record to the Court of Appeals until September 1, 1964. Accordingly the appeal has not yet been docketed in the Court of Appeals, the record has not been transmitted and the District Court has jurisdiction to entertain this motion. *Smith v. Pollin*, 194 F.2d 349, 350 (D.C. Cir.); *Greear v. Greear*, 288 F.2d 467 (9th Cir.); *Ryan v. U. S. Lines*, 303 F.2d 434 (2nd Cir.).

3. At the condemnation hearings the Owners submitted evidence by the testimony of Stanton Kolb and Curt C. Mack that their property had a fair market value at the time of the taking on January 18, 1963, in excess of \$2,400,000.00; Kolb's valuation was \$2,500,000.00 (Tr. p. 385); Mack's valuation was \$2,962,000.00 (Tr. p. 827, 838). The Government submitted evidence by the testimony of their real estate experts, Throckmorton and Savage, that the fair market value of the property did not exceed \$1,372,000.00. Throckmorton's valuation was \$1,140,000.00 (Tr. p. 141); Savage's valuation was \$1,372,000.00 (Tr. p. 291). The jury in effect accepted the testimony of Throckmorton and Savage and made an award of \$1,303,000., i.e. \$37.00 per square foot.

4. Since the denial of their motion for a new trial the Owners have ascertained upon information and belief the following:

(a) Shortly after the taking of the property by the United States on January 18, 1963, the Government employed two experienced, well qualified and outstanding real estate experts, namely, William F. Harps, 1302 New Jersey Avenue, N.W., Washington, D.C. and Arthur M. Fisher, Investment Building, 15th and K Streets, N.W., Washington, D.C., to make careful and independent valuations of the property and to testify for the Government as to their values in this condemnation proceeding.

(b) Pursuant to this employment, Mr. Harps and Mr. Fisher made careful studies of the property and submitted to the Government their respective appraisals. Each appraisal took into consideration all relevant and material

factors, as it was required to do, including an executed lease dated August 8, 1962 of the property (not including 3,300 square feet of land used for a parking lot) by the Owners to GSA for an office building at a rental of \$389,000.00 a year after the required remodeling by the Owners. The value of the property so ascertained by Mr. Harps and Mr. Fisher far exceeded the values submitted at the trial by Throckmorton and Savage on behalf of the Government as well as the jury award.

(c) Upon receipt of their appraisals a Government official directed Mr. Harps and Mr. Fisher to make new appraisals of the property upon a basis which disregarded the lease entered into by the Government and the rental provided for therein. Each expert complied with this directive and submitted to the Government new appraisals which disregarded the lease but again demonstrated that the property had a fair market value at the time of taking far in excess of the values submitted at the condemnation hearings by the Government and of the jury award.

(d) The Government thereupon disregarded the four separate appraisals of Harps and Fisher and employed other real estate experts, namely, Throckmorton and Savage, who appraised the property at the comparatively low values stated above and at the trial the Government submitted their testimony to the Court and jury.

5. Prior to the trial counsel for the Owners requested counsel for the Government to disclose to them the appraisals of all Government experts and the amounts thereof but Government counsel refused to do so, submitting a memorandum of law citing court cases holding that the opinions of experts were not subject to discovery. Accordingly the Owners and their counsel did not know before or during the condemnation hearings (1) that the outstanding Government experts, Harps and Fisher, had valued their property at amounts far in excess of the values submitted to the jury by the Government and (2) that Government officials had directed Harps and Fisher to re-appraise the property disregarding a material factor of value, namely, the lease of the property entered into by

the Government. If counsel for the Owners had known that the appraisals of Harps and Fisher did not confirm those of Throckmorton and Savage, they would have called Harps and Fisher to testify at the trial.

6. The Government expert Throckmorton testified on cross-examination:

“Q. Were you instructed by anyone to appraise it in this particular method? A. No sir.

Q. Were you instructed by anyone to disregard this lease? A. Why, certainly not.” (Tr. p. 193).

The Government expert Savage testified on cross-examination:

“Q. Were you asked to appraise it as though there was no government lease? A. No, I was not asked to do it, I did it on my own.” (Tr. p. 295).

The newly discovered evidence shows that, after Mr. Harps and Mr. Fisher had made their independent appraisals taking into consideration all material relevant factors, including the government lease, as they were required to do, a Government official instructed them to make new appraisals disregarding the government lease. The fact that a Government official gave such instructions to Mr. Harps and to Mr. Fisher indicates that the Government gave comparable instructions to Throckmorton and Savage and affects the credibility of the testimony of Throckmorton and Savage that they did not receive such instructions. In this connection Throckmorton testified that he was not employed until December 1963 or January 1964 (Tr. p. 153) and his appraisal report was not complete until February 27, 1964 (Tr. p. 94) *after* Government attorneys had taken the position in Answers to Interrogatories dated January 2, 1964, that the Government lease on the property was irrelevant to its fair market value. Throckmorton also testified that he had valued for lending institutions building which had not been constructed and he had taken into consideration in valuing property leases depending upon their maker and length (Tr. p. 259, 260).

7. A condemnation proceeding is *sui generis*. It is not an ordinary adversary civil action and its primary function is to assure to the Owners full indemnification. Accordingly the determination of the issue of just compensation in an eminent domain case rests upon broad principles of equity. When the United States exercises its sovereign power of eminent domain to take private property for public use, the Fifth Amendment imposes upon it an implied contract to pay the Owners the fair value of the property. Its Fifth Amendment obligation and the implied contract derived therefrom require the Government to conform to a high standard of disclosure to private property owners of information materially affecting the value of their property and affecting the just compensation payable to them. In violation of this high obligation and in breach of duty the Government treated this case as an ordinary adversary civil action, submitted to the jury the low valuations of their carefully culled experts, and withheld from the Owners, the Court and the jury information materially helpful to the Owners.

8. In this case the value of the private property taken was difficult of ascertainment. The variation between the values of the real estate experts for the Owners and the real estate experts for the Government must have seemed shocking to the jury. The Government experts Throckmorton and Savage differed as to their own values by over \$200,000.00. Under these unusual circumstances expert opinion evidence was of critical significance. Government Counsel reiterated to the jury that the sole interest of the United States was to achieve a fair and just award to the Owners and to the Government and the Government as *parens patriae* used the comparatively low values of Throckmorton and Savage to discredit the much higher values of the real estate appraisers for the Owners, knowing that in its files were appraisals of equally qualified experts totally at variance with those of Throckmorton and Savage. This violated such basic standards of fair dealing by the Sovereign in its relations with its citizens as to require a new trial.

9. In the context of this case the failure of the Government to disclose to attorneys for the Owners the appraisals made on behalf of the Government by Mr. Harps and Mr. Fisher constituted a violation of the Due Process Clause of the Constitution.

10. In the context of this case, without reference to breach of a judicial duty and to the violation of Constitutional rights, the newly discovered evidence confirms the gross inadequacy of the jury award and so requires this Honorable Court, in applying equitable principles, to grant the Owners a new trial. The newly discovered evidence indicates that four real estate experts—two employed by the Owners (Kolb and Mack) and two employed by the United States (Harps and Fisher)—valued this property in amounts far in excess of the jury award and only two experts (Throckmorton and Savage) supported it. If the jury had known of the four separate appraisals of Harps and Fisher, made, not for the Owners, but for the Government, contradicting those which the Government used at the trial, it is difficult to believe that the jury would not have made a more adequate and just award.

11. Government counsel in summation represented to the jury: "We have done everything we can to put before you the facts in this case" (Tr. p. 1100). This statement of the representative of the United States recognized the high obligation of disclosure imposed upon the Government in a Fifth Amendment eminent domain proceeding. It was a representation upon which the jury and counsel for the Owners were entitled to rely and assume to be correct. Yet, the newly discovered evidence indicates the representation was so incorrect that it did not meet the standard of fairness required of it.

12. In support of this Motion there are attached hereto and made a part hereof Affidavits of David Lawrence and Virginia Lee Lawrence, his wife.

WHEREFORE, the Owners respectfully pray that pursuant to Rule 60(b) the Court relieve them of the condemnation award and grant them a new trial and to this end hold a

hearing upon this Motion at which the Owners may be permitted by means of subpoenas to submit the involuntary testimony of Mr. Harps and Mr. Fisher and their respective appraisal reports.

/s/ GEORGE COCHRAN DOUB,

/s/ JOHN J. GHINGHER, JR.

AFFIDAVIT OF DAVID LAWRENCE AND
VIRGINIA LEE LAWRENCE

We live at 5047 Lowell Street, N.W., Washington, D.C. I, David Lawrence, am engaged in real estate investments in the District of Columbia, and own a 1/3rd interest in the property involved in this condemnation proceeding, known as No. 920-922 E Street, N.W. Washington, D.C. On August 7, 1964, we called upon Arthur M. Fisher, real estate appraiser, at his office in the Investment Building, 15th and K Streets, N.W., Washington, D.C. We had not met Mr. Fisher before the meeting. In the course of our meeting and in answer to questions, Mr. Fisher said:

Shortly after the taking of this property by the Government, he was employed by the Government in March 1963, to make a valuation of the property and to testify for the Government as to its fair market value at the trial of this condemnation proceeding. He made a study of the property and submitted to the Government his written appraisal. At that time he had in his possession a copy of the Government lease on the property, a copy of the commitment of the Woodmen of the World with the Owners (the sale-lease-back arrangement), the plans of the Owners for the remodeling of the building to an office building pursuant to the Government lease and other pertinent data. He also had inspected the property and had seen the remodeling work in progress. After submitting his appraisal to the Government, he was instructed by Anthony Liotta, Esq., attorney for the Lands Division for the Department of Justice, to make a new appraisal disregarding any reference to the executed government lease of the property. He complied

with this directive and submitted to the Government a new appraisal disregarding the government lease.

Mr. Fisher said that there was no question in his mind that his first appraisal properly took into consideration all material factors, including the government lease and the rental provided for therein and the commitment to the Woodmen of the World and he deemed the highest and best use of the property to be that of an office building. He was aware at that time that the Owners had just completed the renovation of the former Washington Evening Star Building at 11th and Pennsylvania Avenue (approximately 2½ blocks away) for Government tenancy and was aware that the Owners had placed a second trust on their property on E Street to provide funds for the conversion of the building to an office building in accordance with the requirements of the Government lease and he was satisfied that the Owners were financially able to complete the remodeling. His second appraisal disregarding the government lease showed a fair market value at the time of the taking of about the same amount as that contained in his first appraisal.

Mr. Fisher said that he was not free to show us his appraisals or to reveal the values which he had placed upon the property. He said that he had valued for the Government the southeast corner of 9th and E Streets used for a gasoline station (which is about 100 feet from our property) at about \$65.00 per square foot ("the mid-sixties") and he had concluded that the value of our land with existing improvements was comparable in value to his valuation of the nearby gasoline station property. (Since it is undisputed that our property contains 35,000 square feet of land, upon this basis Mr. Fisher must have valued the property at about \$2,275,000.00.) Mr. Fisher also stated that the Government had paid \$67.50 a square foot for the northeast corner of 9th Street and D Street, known as the "Milestone" property, consisting of 10,000 square feet of land (which is approximately 100 feet from our property). Mr. Fisher inferred that this price confirmed the value which he had placed upon our property in his appraisal

for the government. He said "I considered that property inferior to your property because of your larger assemblage of land and E Street was far more desirable than D Street."

Mr. Fisher said that he was aware of the cost of the property to the Owners but he did not believe that the purchase price reflected the full value of the property because at the time of the taking land values had soared in this area.

Mr. Fisher said that he was surprised when the Government did not call him to testify for the Government at the trial because he believed that he had made careful and reliable appraisals and he had made a point of being available for the trial.

We asked Mr. Fisher if he would be willing to give us an affidavit of what he had told us. He said he would not do this but he would, of course, comply with a subpoena.

/s/ DAVID LAWRENCE

/s/ VIRGINIA LEE LAWRENCE

CITY OF BALTIMORE, STATE OF MARYLAND, ss:

I HEREBY CERTIFY that DAVID LAWRENCE and VIRGINIA LEE LAWRENCE, his wife, personally appeared before me, a Notary Public in and for the State of Maryland, and being duly sworn, deposed on oath that the statements made in the foregoing affidavit are true and correct; this 25th day of August, 1964.

/s/ CARMEN Q. SHEENE

Notary Public

AFFIDAVIT OF DAVID LAWRENCE AND
VIRGINIA LEE LAWRENCE

On July 7, 1964, we called upon William S. Harps, real estate appraiser, at his office at 1302 New Jersey Avenue, N.W., Washington, D.C. In the course of our meeting and in answer to questions, Mr. Harps said:

He was employed by the Government shortly after the taking of this property to make an appraisal of it as of the time of the taking and to testify for the Government as to its fair market value in this condemnation proceeding. He made an intensive study of the property and submitted to the Government his written appraisal. Before doing so he had before him full information as to the Government lease, the commitment of the Woodmen of the World, the set of plans of the Owners for the remodeling of the building to an office building pursuant to the Government lease, and other pertinent data. He had visited the property and seen the remodeling work in progress.

After submitting his appraisal to the Government, he was instructed by Anthony Liotta, Esq., attorney for the Lands Division for the Department of Justice, to make a new appraisal disregarding any reference to the executed government lease. He complied with this instruction and submitted a new appraisal which made no reference to the government lease. He was satisfied that his first appraisal was a proper one because it took into consideration all the material factors including the government lease and the rental provided therein. His second appraisal, which disregarded the government lease, resulted in a fair market value at the time of the taking of about the same amount as that contained in his first appraisal.

Mr. Harps said that his conclusion as to value disregarding the lease was \$68.00 per square foot average. (Since it is undisputed that our property contains 35,000 square feet of land upon this basis Mr. Harps must have valued the property at about \$2,380,000.00.) He was particularly familiar with values in this area because he and Mr. Curt Mack (who testified for the Owners) had been

employed by the Government to value for the Government the unimproved parcels of land involved in the two square blocks being condemned for the new FBI building.

Mr. Harps further said that this area had been dormant for many years but before the taking there had been an explosion of land values in this area. In this connection he referred to the northwest corner of 12th and E Streets having been sold as land for an office building at approximately \$77.00 per square foot and the construction of a building on this property. He also referred to the Raleigh Hotel site at the northeast corner of 12th and Pennsylvania Avenue which had been sold for \$100.00 a square foot prior to the taking. He also referred to the fact that the Owners' property consisted of an unusually large assemblage of 35,000 square feet zoned C-4, which is the most desirable commercial zoning in the District of Columbia. He had high praise for the work in progress renovating the building for an office building and said the rental provided in the Government lease was extremely reasonable.

Mr. Harps said that a number of months after he made his appraisal he was surprised to hear that the Government had employed other appraisers, namely, Mr. Throckmorton and Mr. Savage. Mr. Harps was not asked to testify at the trial.

We asked Mr. Harps to show us his appraisals for the Government. Mr. Harps said that he was not free to do this but he would comply with a subpoena for them.

/s/ DAVID LAWRENCE

/s/ VIRGINIA LEE LAWRENCE

CITY OF BALTIMORE, STATE OF MARYLAND, ss:

I HEREBY CERTIFY that DAVID LAWRENCE and VIRGINIA LEE LAWRENCE, his wife, personally appeared before me, a Notary Public in and for the State of Maryland, and being duly sworn, deposed on oath that the statements made in

the foregoing affidavit are true and correct, on this 25th day of August, 1964.

/s/ CARMEN Q. SHEENE

Notary Public

PLAINTIFF'S OPPOSITION TO DEFENDANTS'
MOTION FOR NEW TRIAL ON THE GROUND
OF NEWLY DISCOVERED EVIDENCE

Comes now the United States of America, by its undersigned counsel, in opposition to the defendants' motion for a new trial under Rule 60(b), of the Federal Rules of Civil Procedure, on the ground of newly discovered evidence, and respectfully states as follows:

A notice of appeal was filed in this cause by the defendants on July 2, 1964. The District Court is without jurisdiction to grant a motion for a new trial in a case which is pending in the United States Court of Appeals. It is noted, however, that in *Smith v. Pollin*, 194 F.2d 349 (C.A. D.C. 1952), the Court of Appeals in this jurisdiction has approved of a procedure wherein a motion for a new trial on the grounds of newly discovered evidence may be filed in the District Court when an appeal is pending in the Court of Appeals and, if the District Court indicates that it would grant the motion, the appellant should then make a motion for remand of the case in order that the District Court could grant the motion for a new trial. In view of this holding of the United States Court of Appeals for the District of Columbia, plaintiff does not raise the question of jurisdiction.

Plaintiff is in no way bound to adopt or use every estimate or appraisal submitted to it and should discard those it considers erroneous for any reason, or which may be based upon incorrect approaches to value. Plaintiff is under a duty not to present to the Court any evidence which it believes disregards established legal principles.

In Federal eminent domain proceedings, prior sales of the property itself furnish the most important, unbiased factual evidence of market value.¹ *United States v. Toronto Navigation Co.*, 338 U.S. 396 (1949); *Carlstrom v. United States*, 275 F.2d 802 (C.A. 9, 1960); *Baetjer v. United States*, 143 F.2d 391, 397 (C.A. 1, 1944); cert. den. 323 U.S. 772; *United States v. 5,139.5 Acres of Land, Etc.*, 200 F.2d 659, 661 (C.A. 5, 1952); *United States v. 329.05 Acres of Land, Etc.*, 156 F. Supp. 67 (S.D. N.Y. 1957), aff'd *sub. nom. United States v. Kooperman*, 263 F.2d 331 (C.A. 2, 1959); *United States v. Ham*, 187 F.2d 265 (C.A. 8, 1951).

In the absence of prior sales of the subject property, the best evidence of value available is the price at which comparable properties in the vicinity of the condemned property changed hands in voluntary transactions at about the time of taking. *Baetjer v. United States*, *supra*. Market value predicated upon any other criterion becomes at best only a guess by informed persons. *United States v. 18.46 Acres of Land, Etc.*, 312 F.2d 287, 288 (C.A. 2, 1963); *United States v. 1.108 Acres of Land, Etc.*, 204 F. Supp. 737.

A valuation based upon the capitalization of income from a hypothetical office building is speculative and conjectural and not indicative of market value.

No party is compelled to use any particular witness or to present any particular appraisal testimony. Furthermore, the work product of the lawyer is not subject to discovery and the weight of authority precludes discovery of the opinions, mental processes, weight given to various factors of valuations and appraisal reports of a party's expert appraisers. In the instant case, the Court, in its pretrial order of March 10, 1964, recognizing those principles, refused to allow discovery of appraisal reports of experts which the parties intended to use at trial. This Court did require an exchange of names of appraisers that were to be called at trial, which order was complied with

¹ The evidence reveals in the instant case that the defendants purchased the subject property on March 12, 1962, or approximately ten months prior to the date of taking.

by plaintiff. It should be noted that the Honorable John J. Sirica, in *District of Columbia, a municipal corporation v. All of Lot 803, containing 1831.57 sq. ft., etc., et al.*, District Court No. 1-62,² held that the overwhelming weight of authority precludes discovery of opinions, mental processes, weight given to various factors of valuations and appraisal figures, and that their production would also violate the general rule that the work product of the lawyer is not subject to discovery. See also *Hickman v. Taylor*, 329 U.S. 495, 511 (1947); *Alltmont v. United States*, 177 F.2d 971, 976 (C.A. 3, 1949). As stated in *Boynton v. R. J. Reynolds Tobacco Co.*, 36 F. Supp. 593 (D. Mass. 1941), p. 595:

"* * * An expert employed by one of the parties ought not to be compelled to furnish expert testimony to the other just because the latter offers him compensation. It is his privilege, if not his duty, to refuse compensation from one of the parties when he had already accepted employment from the other, and such refusal ought not of itself to result in his being ordered to testify."

That decision was followed in *United States v. Certain Acres of Land, Etc.*, 18 F.R.D. 98, 21 Fed. Rules Serv. 26b.411, p. 409 (M.D. Ga. 1955), and *Hickey v. United States*, 18 F.R.D. 88 (E.D. Pa. 1952) to deny production of the appraisals and data relating to such appraisals prepared by the Government's experts.

Plaintiff is informed that, in this case, the defendants had a third expert witness, Mr. Fred Babcock, who they chose not to use at trial. Plaintiff submits it was defendants' privilege not to use Mr. Babcock, and that it has the same freedom of choice.

The defendants state that the newly discovered evidence is that appraisals were made for the United States by Messrs. William S. Harps and Arthur M. Fisher, and that the United States chose not to use said appraisers, and that if defendants knew of these appraisals, they would have

² A copy of Judge Sirica's order is attached.

called Messrs. Harps and Fisher to testify at trial. The affidavits of Messrs. Harps and Fisher, attached hereto, as Exhibit A and Exhibit B, and a copy of the letter addressed to Mr. D. H. Blackwelder from Sheldon E. Bernstein, attorney for defendants, attached hereto as Exhibit C, are conclusive evidence that the defendants knew at all times prior to the time of trial, and pretrial, that Messrs. Harps and Fisher were employed by the General Services Administration to make an appraisal of their property.

As heretofore stated, plaintiff is not compelled to present any particular witness at trial and is under a duty not to present any testimony, or any witness, or any appraisal report which it believes to be unsupported in law and fact.

Defendants have submitted no new evidence which entitled them to the relief sought. *United States v. 72.71 Acres of Land, Etc.*, D.C. M.D. 1959, 23 F.R.D. 635 cert. den. 358 U.S. 931, aff'd 273 F.2d 416, cert. den. 364 U.S. 818; *Kolstad v. United States*, 262 F.2d 839 (C.A. 9, 1959); *DiSilvestro v. United States Veterans Administration*, 9 F.R.D. 435; *Brown v. Pennsylvania Railroad Co.*, 282 F.2d 522 (C.A. 3, 1960), cert. den. 365 U.S. 818.

The criminal cases cited by defendants in their motion do not support their contentions.

WHEREFORE, plaintiff respectfully requests that defendants' motion for a new trial be denied.

UNITED STATES OF AMERICA

By: ANTHONY C. LIOTTA

Attorney, Department of Justice

EXHIBIT A

DISTRICT OF COLUMBIA, SS:

WILLIAM S. HARPS, being duly sworn on oath according to law deposes and says:

1. That on January 22, 1963, I signed a contract with the General Services Administration to make appraisals of fifteen parcels in Square 378, District of Columbia, known as Group 2, F.B.I. Building Site; that among the parcels in Group 2, was Parcel No. 4, consisting of Lots 48, 817, 818, E, F, G, H, I, K, 831, 50 and 836 in Square 378, owned by Dicker, Lawrence and Fromkin.

2. That during the course of the appraisal of Parcel 4, on March 6, 1963, I called Mr. Sheldon Bernstein, attorney for the owners, and advised him that I was a real estate appraiser appointed by the General Services Administration to appraise Parcel No. 4 and requested permission to inspect the plans and specifications of the proposed remodeled office building to which the existing structures on the site were to be converted. I was advised by Mr. Bernstein that Mr. Curt Mack, appraiser for the owners, either had the plans or would have them and that he, Mr. Bernstein, would arrange for the plans to be inspected by me.

3. That subsequent to this call (in No. 2 above), I called Mr. Curt Mack and made an appointment to inspect the plans and specifications. At 10:00 o'clock a.m., on March 12, 1963, I kept the appointment in Mr. Curt Mack's office at 1120 Connecticut Avenue, Northwest, and there carefully examined the plans and specifications until late in the afternoon. While inspecting the plans in the first floor conference room, Mr. Dicker, co-owner, of Parcel No. 4 came in and was introduced to me by Mr. Mack. Mr. Mack advised Mr. Dicker that I was one of the appraisers for the Government.

/s/ WILLIAM S. HARPS
Appraiser

Subscribed and sworn to before me this 3rd day of September, 1964.

/s/ MARY M. COLE
Notary Public, D.C.

(SEAL)

EXHIBIT B

DISTRICT OF COLUMBIA, SS:

ARTHUR M. FISHER, being duly sworn on oath according to law deposes and says:

1. I signed an original contract with the General Services Administration, Contract No. GS-03-B-13055 on January 18, 1963, to appraise fifteen (15) parcels identified as Group 2, Section 1, FBI Building site, squares 378-379, District of Columbia. Included in these fifteen (15) parcels was the above-captioned parcel located in square 378, and owned by Albert P. Dicker, et al., and also identified as the Merchants Transfer and Storage Co. properties.

2. That early in 1963, probably in early February of that year, I received a set of plans, specifications, and a copy of the commitment letter of the Woodmen of the World from Curt Mack, the appraiser for the property owners. Mr. Mack was well aware that I was one of the Government appraisers for this property.

/s/ ARTHUR M. FISHER

Subscribed and sworn to before me this 3rd day of September 1964.

/s/ BETTY C. BOWLES

Notary Public, D.C.

My Commission Expires Feb. 28, 1968.

(SEAL)

EXHIBIT C

D. H. Blackwelder, Esquire
Department of Justice
Room 6810, United States Court House
3rd and Constitution Avenue, N.W.
Washington 1, D.C.

Re: United States of America v.
Certain Land in Square 378 in the
District of Columbia, Albert P. Dicker,
et al., and unknown owners—
District Court Docket No. 5-63

Dear Mr. Blackwelder:

For your information in connection with the above condemnation, I am enclosing a copy of a commitment of November 8, 1962 from Woodmen of the World Life Insurance Society with reference to a sale-lease back of the improved portions of the above condemned property and a copy of my clients' acceptance of November 14, 1962, with which they deposited with Woodmen of the World \$14,000.00, as required by the commitment.

I would assume that the fact and substance of the foregoing commitment is a matter to be called to the attention of the appraisers. I should also advise you that when we come to the matter of compensation, we will have prepared and submit to you an itemized list of monies expended by my clients and now lost by reason of the condemnation, for which expenditures reimbursement will be sought. These include, for example, the deposit with Woodmen of the World, brokerage commissions, in connection with that commitment, obligations in connection with preparation of architectural plans for reconstruction to meet the needs of the Government lease, permit fees for the reconstruction, premiums for bid bonds, costs incurred for mortgage financing in connection with the aforesaid improvements, demolition costs, etc.

I should tell you that today Mr. William S. Harps telephoned me and advised me that he had been retained by

the General Services Administration to do the appraisal for the Government in connection with this particular condemnation and he inquired of me whether I would be willing to permit Mr. Curt Mack, of the Berens Companies, to allow him (Harps) to examine copies of the architectural plans and specifications for the renovation of the improved portions of the condemned premises. Since I was of the view that a sensible disposition of the valuation issue required complete, mutual cooperation and candor, I, of course, immediately authorized Mr. Harps' access to those plans and specifications.

I also inquired of him whether he had been fully apprised of the Government lease and of the commitment from Woodmen of the World, to which he responded that he knew nothing of the latter, and as to the Government lease, he had not seen it, but had been informed of its terms. I wondered, therefore, whether to assist a possible amicable disposition, it might be advisable to turn over to your appraiser, as we have to ours, actual copies of both the Government lease and the Woodmen commitment.

Finally, I believe that we will have sufficient data in our hands on the valuation question within the next two or three weeks so that we would be in a position to sit informally with you and other appropriate Government representatives in an effort to arrive at a voluntary conclusion with respect to the total condemnation award to be made. Accordingly, may I hear from you at your early convenience as to when it might be appropriate to set up such an informal meeting.

Thanking you for your cooperation, I am,

Very truly yours,

SHELDON E. BERNSTEIN

SEB:ji

Enclosures CC: Mr. Albert P. Dicker
CC: Mr. David Lawrence
CC: Mr. David H. Fromkin

EXTRACT FROM HEARING ON MOTION

(Mr. Doub) Now, Your Honor, since this case involved sums considerably in excess of a million dollars, since the Government experts who were not called to testify, Mr. Harps and Mr. Fisher, are here involuntarily, pursuant to subpoena, and our motion does raise, we believe, a Fifth Amendment question.

Before arguing our motion, we would like to briefly submit their testimony in support of our motion. Now, the Government has moved to quash the subpoenas on the ground that our motion is without merit. But I submit that before arguments on the motion and before Your Honor rules on our motion, you should permit us to make our record for your Honor's benefit.

I assure Your Honor that can be done very quickly because all we wish to put in the record are the written appraisals of these experts, and ask them why they each made two separate appraisals for the government instead of only one, and to show what I think is uncontested that, after they made their appraisals for the government, which far exceeded those of Throckmorton and Savage who were called to testify, that they were then directed to make new appraisals, ignoring and without considering the GSA lease, which they had taken into consideration.

So, I think it is far more desirable, Your Honor, to have the exact facts before you than to have me make a proffer of proof which might be much less exact.

(The Court) Well, I would rather hear your entire argument and then decide what to do so far as any oral testimony is concerned.

(Mr. Doub) Very well, Your Honor.

* * * * *

(The Court) All right, gentlemen. The Court will not hear any testimony. The Court will not decide the matters that are before it. I will let you know as soon as possible.

* * * * *

ORDER

This matter came before the Court for argument on the "Motion for New Trial on the Ground of Newly Discovered Evidence." The Court having considered the motion, the opposition thereto, and arguments of counsel, it is this 19th day of October, 1964,

ORDERED, that the "Motion for New Trial on the Ground of Newly Discovered Evidence" be, and the same hereby is, denied.

LEONARD P. WALSH,
Judge.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

No. 18918 and No. 19036

ALBERT P. DICKER, DAVID LAWRENCE, ET AL,
Appellants,

v.

THE UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANTS

Of Counsel:

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United States Court of Appeals
for the District of Columbia Circuit

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Nathan J. Paulson
CLERK

QUESTIONS PRESENTED

1. Was the District Court in error in its pre-trial order prohibiting the discovery of the appraisal reports of government experts?
2. Was the District Court in error in repeatedly ruling that a valid subsisting lease of a substantial part of the property to the government should not be considered by the jury as evidence of fair market value of the property?
3. Was the District Court in error in ruling that a contract of the owners with a life insurance company for the sale and lease-back of a substantial part of the property should not be considered by the jury as evidence of fair market value of the property?
4. Did the District Court improperly restrict the cross-examination of government expert Throckmorton?
5. Was the District Court in error in refusing to strike the valuation testimony of government expert Throckmorton when (a) he disregarded a valid subsisting lease of the property and (b) he made no attempt to value the property on the basis of what he claimed was its highest and best use?
6. Was the District Court in error in its pre-trial ruling forbidding the owners to submit evidence of sums actually expended in good faith on renovation of the property?
7. Was the District Court in error in refusing to permit the owners to submit testimony in support of their Motion for a New Trial on the Ground of Newly Discovered Evidence and in denying the Motion?

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JURISDICTIONAL STATEMENT

Jurisdiction of the Court below was pursuant to 28 U.S.C., Sec. 1358. Jurisdiction of this Court to review the decisions of the Court below is premised upon 28 U.S.C., Sec. 1291.

THE CASE

These are appeals by property owners from (1) a final judgment in a condemnation proceeding instituted by the United States (No. 18918) and (2) the denial of their Motion for a New Trial Upon the Ground of Newly Discovered Evidence (No. 19036)).* The judgment appealed from in the amount of \$1,303,594.00 was entered after a trial by jury and its award in that amount.

The property condemned was known as the Merchants Storage and Transfer Building property located at 918-922 E Street, N.W., between 9th and 10th Streets in downtown Washington. It was taken for public use for the construction of the new Federal Bureau of Investigation Building.

THE FACTS

On January 18, 1963, the United States filed its complaint and declaration of taking and deposited the sum of \$1,155,000.00 in the registry of the District Court as estimated just compensation for the property. The sole issue in the ensuing condemnation proceeding was just compensation payable to the owners under the Fifth Amendment.

The property taken for public use consisted of the following parcels of land:

Parcel A. A front parcel on the south side of E Street, N.W., composed of Lot No. 48 in Square 378, 42.166 feet fronting on E Street with a depth of 187.87

* These separate appeals were consolidated pursuant to joint motion of the parties and an Order of this Court.

feet to a 30 foot east-west public alley. This parcel is "T" shaped and expands to a width of 82.17 feet. It contains 11,437 square feet and is entirely occupied by an 8 story warehouse building.

Parcel B. A rear parcel, containing 7 contiguous lots 831 and E through K, fronting 99.67 feet on the south side of the east-west public alley and 77 feet-plus in depth, containing 7,908 square feet. This parcel is occupied by a 6 story warehouse building.

Parcel C. A front parcel on the south side of E Street, N.W., contiguous to Parcel A, known as No. 817, 818 and 836 E Street, fronting on E Street 76.5 feet with a depth of 187.875 feet to the 30 foot public alley. It contains 13,454 square feet, has no improvements and is used as a parking lot.

Parcel D. A rear parcel known as Lot 50, on the south side of the 30 foot alley 30 feet in width and 77.875 feet in depth, containing 2,336 square feet.¹

The combined area of the three parcels was 35,134 square feet (App. 13).*

The two warehouse buildings are constructed of brick, reinforced with concrete. The warehouse building fronting on E Street is 8 stories high (App. 14). The building is in the form of a "T", the narrower portion fronting on E Street and widening toward the rear of the building (App. 14). The floors in this building were reinforced concrete supported by concrete and steel columns and steel beams. The walls were solid brick (App. 14). A concrete stairway served all floors as well as an electric freight elevator (App. 15). The ground area is 11,437 square feet (App. 15). The front section of the building has an overall height of approximately 96 feet and the rear section a height of 93½ feet (App. 15). The building contained a total area of 91,631 square feet (App. 174).

¹ The real estate experts used different classifications but that made above seems clearer.

* "App." references are to Joint Appendix.

The warehouse building to the rear, rectangular in shape, is 6 stories in height with an annex on the south side 3 stories in height. Floors are concrete and the upper levels are carried by reinforced concrete columns. Exterior walls are brick (App. 16). Total area of this building is 85,592 square feet (App. 16, 17). The general condition of the building was "good solid construction" (App. 18).

At the time of the taking the zoning of these properties was C-M Downtown Central Business Commercial, known as C-4 (App. 18) which permits a maximum height of 110 feet with improvements, having any number of stories or 130 feet if the adjacent street is at least 110 feet between building lines (App. 18). The improvements may contain 10 times as much gross floor area as ground area. Retail stores and other commercial establishments, not of a manufacturing nature, are permitted (App. 18).

The property was purchased by the owners from Merchants Transfer and Storage Company by deed dated March 12, 1962, for \$1,000,000.00 (App. 23). There was evidence that prior to the taking this part of downtown Washington near the Federal Triangle was undergoing a dynamic increase in value—an office building boom (App. 156, 167).

On February 16, 1962, the General Services Administration issued an "Invitation for the Leasing of Space" soliciting bids for the leasing of office space in the District of Columbia and nearby Maryland and Virginia but preferably in and near the central business district of Washington within an 8 mile radius from the Ellipse south of the White House (App. 325, 326, 329). Pursuant to this invitation offers of 6,000,000 square feet of space were made to the government (App. 327). Most of the space offered the government was in buildings which were not then in existence (App. 328, 330). The owners submitted a bid in re-

sponse to this invitation. GSA obtained 626,000 square feet of space pursuant to its invitation for bids (App. 355).

Thereafter GSA determined that it required additional space and negotiated with the owners, Mr. Dicker and Mr. Lawrence, a 5 year lease beginning May 16, 1963, on the buildings (excluding Parcel C, the parking lot of 13,454 square feet on E Street) at a rental of \$388,999.92 a year with an option in the government to renew for an additional period of 5 years at an annual rental of \$417,000.00. The lease, executed August 8, 1962, provided that the owners would remodel the buildings into office buildings in accordance with architectural plans prepared on behalf of the owners approved by the government. The owners were required to give a surety bond to the government in the amount of \$389,000.00 guaranteeing that the buildings would be ready for occupancy in accordance with the terms of the lease (App. 335). There was also a liquidated damage clause in the lease for delay (App. 335) and for each day of delay in delivering the remodeled buildings to the government the owners were required to pay the sum of \$1,000.00 (App. 337). GSA selected this building because it was one which could be remodeled and delivered to the government within the time allotted (App. 330). The lease covered the buildings but did not include the vacant lot on E Street containing 13,454 square feet of land used as a parking lot (App. 357).

Before executing the lease GSA had an appraisal made of the property for the purpose of insuring that there would be no violation of the Economy Act which limits government rental to 15% of the value of the property per annum (App. 334). GSA concluded that there was no violation of the Economy Act (App. 334).

Under the plans windows, new elevators, interior walls, air conditioning, and a bridge from one building to the other had to be installed (App. 143).

Thereafter the owners obtained the approval of the remodeling plans by the municipal authorities and the necessary permits for the work (App. 143). A contractor, after obtaining estimates from subcontractors submitted a bid for the conversion of the buildings in the amount of \$1,380,000.00 (App. 377, 379, 385, 388). Although the contractor had not executed a written contract, it believed it had an agreement (App. 382, 383, 388, 389). As of the time of the taking, the contractor had had 249 window frames and electrical conduits delivered to the site (App. 390, 500, 501, 502). The contractor had pulled out the elevators, lavatories and heating plant and cleared the building (App. 141). Some reinforcing rods had been delivered to the job (App. 141).

On November 8, 1962, the Woodmen of the World Life Insurance Society of Omaha, Nebraska, entered into a written contract with the owners to purchase this property (excluding Parcel C, the 13,454 square foot parking lot on E Street and Parcel D—lot 50) and to lease back the purchased property to the owners (App. 556A). This Insurance Society had \$250,000,000.00 of investments. The property was brought to its attention by Mr. Alfred Bell, a broker of Washington, after the Society had financed the nearby Esso building. The property had been inspected by three officials of the Insurance Society (App. 299) and the sale and lease back were recommended by them, and approved by its investment committee consisting of its President, Executive Vice President, Secretary and Treasurer (App. 265). When the Society entered into the contract, it had before it the GSA lease, blue prints for remodeling and a rendering of the buildings (App. 302, 305, 306).

Under the commitment, which was accepted in writing by the owners on November 14, 1962 (Dfts' Ext. 3, App.

556A), the Life Insurance Society agreed to purchase the property at a sum not to exceed \$2,800,000.00 or its appraised value, whichever was the lesser. The lessee agreed to furnish at its expense upon completion of the renovation an appraisal by an appraiser approved by the Society who was a member of the American Institute of Appraisers. The lease-back by the Life Insurance Society to the owners was for a primary term of 25 years from the date of the conveyance of title with a privilege to the lessee of electing 3-21 year renewal terms. The annual rent payable by the lessee to the Life Insurance Society was an amount equal to 7.74% per annum upon the actual purchase price paid by the Society. A condition of the purchase and lease-back was that there be a lease to General Services Administration for a term of 5 years or more which at the date of purchase would be in force and effect and this lease would provide for an annual rent of not less than \$388,999.92 with an option to renew for an additional period of 5 years at a rental of \$417,000.00 annually, and further that the government should have occupied the premises under its lease and entered into possession. This lease was to be assigned to the Life Insurance Society. A good faith deposit by the owners in the amount of \$14,000.00 was required and this payment was made (App. 308). The property to be sold to the Insurance Society was limited to a total ground area of approximately 20,000 square feet (App. 308).²

The parking lot of 13,454 square feet and lot 50 were not included in the sale and lease-back and would continue to be owned by the present owners (App. 308, 317). The Life Insurance Society considered this commitment to be a binding contract of a kind which would be relied upon by banks and lending agencies (App. 309).

The Life Insurance Society calculated the purchase price in accordance with its standard yard stick used throughout

² The aggregate ground area of the land taken was 35,000 square feet.

the country for the appraisal of office space, namely, a low cost construction for office space is about \$20.00 a square foot which on the basis of 130,000 square feet would make the buildings worth about \$2,600,000.00 exclusive of the underlying land (App. 315). The requirement as to an appraisal was pursuant to a Nebraska statute.

The rental provided for at 7.74% of \$2,800,000.00 would be \$216,720.00 (App. 318); it was designed to give the Life Insurance Society a 6% net return and complete amortization in 25 years (App. 319). The Life Insurance Society calculated that, since General Services Administration would pay a rental of \$388,999.92 under its lease to the lessees of the Society—the present owners—and their required rental to the Life Insurance Society would be \$216,720.00, after the deduction of maintenance and fixed charges payable by the Society's lessees—the present owners—they would have a realizable net income in excess of \$66,000.00 (App. 304). The Life Insurance Society anticipated that, if the government did not renew its lease, "it would go into private industry and annual per foot rental would be much higher than if the government rented" (App. 323). The Society did not believe that there would be much difficulty in renting a converted office building of this type to multiple tenants or as a whole (App. 324).

The issue of just compensation was submitted to the jury upon the basis of the testimony of real estate experts employed by the government and employed by the owners.

Throckmorton, a government expert, assumed that the buildings would continue to be used as a warehouse and the vacant lot would continue to be used as a parking lot (App. 54). He appraised it as he found it and valued it as a warehouse and valued it for warehouse purposes (App. 79, 80, 88, 96). Throckmorton did not take into consideration the lease to GSA or the commitment of the Life Insurance

Society (App. 57, 58, 106). He valued the land on E Street at \$35.00 per square foot, i.e., \$794,244.00 (\$874,302.00 less \$80,058.00 representing the cost of razing the building) (App. 82, 83, 97, 98). He valued the parking lot at \$23.23 per square foot by capitalizing the rental provided in a subsisting lease although he did not know the length of the lease (App. 81, 88, 93).

Throckmorton considered the best use of the property fronting on E Street to be "a loft type building or a building with one of the discount houses or a type structure of that kind (App. 20, 55, 57) but he did not value it upon this basis (App. 79). In his final analysis he stated that he based his final conclusions upon comparable sales as to land and similar types of buildings (App. 80, 112). His report was completed in February 1964 (App. 55). A number of properties in the area Throckmorton did not deem to be comparable because there are no warehouses in the downtown area other than the Landsburgh warehouses on 8th Street (App. 28, 29). Accordingly this expert compared the value of this property on E Street with a warehouse building on Kalorama Road (App. 30) and other properties outside this area (App. 33, 34). He investigated numerous warehouse rentals in various sections of the city and capitalized rental income in determining his valuation by the income approach (App. 34, 49, 52). On this basis he concluded that 50 cents per square foot was the fair rental value for the buildings (App. 49). Throckmorton opined that the fair value of the properties at the time of the taking was \$1,140,000.00 (App. 54).

Savage, a government real estate expert, testified that he made his appraisal in May, 1963 (App. 123). He made his appraisal as of the date of the taking on the basis of comparative analysis, reproduction analysis and capitalization but he said he gave the greatest weight to the com-

parative approach (App. 123). From a comparative analysis of other properties he concluded that this property had a fair value of \$1,311,750.00 (App. 133). On the basis of reproduction cost less depreciation the property had a value of \$1,372,000.00 capitalizing income at 12% (App. 139). Savage gave no consideration either to the government lease or to the commitment of the Life Insurance Society because contingencies were involved (App. 142). In considering comparable sales Savage gave no consideration to the Evening Star Building or the Raleigh Hotel (App. 153, 154).

Kolb, a real estate expert for the owners, who had also done appraisal work for the government, testified that this immediate area prior to January 1962 was undergoing a "very strong office building boom" (App. 167). The parking lot was an excellent potential office building site. The warehouse could reasonably and economically be converted into office building space (App. 171, 172). He estimated the value of the land in Parcel A and Parcel B covered by the warehouse buildings at \$55.00 a square foot and the parking lot with its 13,454 square feet at \$60.00 a square foot. His valuation for the land at the time of the taking was \$1,999,000.00 on the basis of comparative land values (App. 181). He valued the front building, after depreciation, at \$667,000.00 (App. 182, 183) and the rear building after depreciation, at \$284,000.00 (App. 183). Upon this basis Kolb valued the buildings and land as an entirety at \$2,950,000.00 as of the date of the taking (App. 183).

In Kolb's opinion the highest and best use of the property was to convert the buildings from warehouse to office buildings to be rented to single occupancy tenant or multiple tenants (App. 185). The government lease confirmed his judgment but did not influence it (App. 185). The property would have found a tenant for office space at a rental

in the amount of, or in excess of, the rental provided for in the government lease (App. 188). Kolb calculated that, after necessary fixed and operating expenses, the owners would have left a net income of \$203,000.00. Capitalizing this at 9% (App. 192) and adding the value of land gave a value of \$4,257,000.00 after conversion to an office building (App. 192). He estimated the cost of remodeling the building at \$1,673,000.00 which left a value at the time of taking before this expenditure of \$2,577,000.00 (App. 193). This was his ultimate conclusion of value for the property, as of January, 1963 (App. 193, 194).

Mack, a real estate expert for the owners, who had testified in numerous cases for the government as well as companies and individuals, testified that the best use of this property was by remodeling the buildings for offices for commercial purposes (App. 404), and that use of the building as a warehouse was "an anachronism" (App. 405). In his opinion the rental provided for in the government lease was a fair market rental (App. 412, 425). Mack gave consideration to the government lease and to the commitment to sell and lease-back between the owners and the Woodmen of the World (App. 417-425). He considered the 7.74% return to the Woodmen of the World a relatively low rate (App. 424).

Mack valued these properties as of January 18, 1963, the date of the taking, at \$2,962,000.00. He did so by (1) valuing the land at \$988,774.00 (App. 427), (2) he estimated the annual operating expenses and fixed charges of the owners under the government lease at \$122,613.00 and deducted it from the rental of \$389,000.00 provided for in the lease (App. 429-433), (3) he made a further deduction of \$60,728.00 for depreciation (App. 433). (4) he then capitalized the balance of the net income under the lease, i.e., \$205,659.00 on a 45 year expected economy productive life of the buildings (App. 434) at a capitalization rate of

8¼% (App. 435). This gave Mack a capitalized value of the income from the lease attributable to the improvements as remodeled of \$2,492,836.00 (App. 436). To this he added his land values of \$1,012,000.00 which gave a figure of \$3,505,000.00 which, in his opinion, would be the value of the property after the buildings had been remodeled in accordance with the plans and specifications (App. 436). From this figure he deducted \$1,350,000.00 for the cost of remodeling the buildings which gave a value of the property under lease to the government at the time of the taking of \$2,155,000.00 (App. 437). He appraised the parking lot of 13,454 square feet, which was not included in the government lease, at \$60.00 a square foot, i.e., \$807,000.00 (App. 437-438). Accordingly his value for the entire property as of the date of taking was \$2,962,000.00 (App. 439).

Venneri, a general contractor, testified that the owners submitted to him the detailed plans and specifications for the remodeling of the buildings into office buildings (App. 374, 375). He and his associates concluded that it would cost \$1,380,000.00 to effect the conversion of the buildings (App. 377, 378), and his company submitted a written proposal to the owners in the amount of \$1,440,000.00 (App. 379). Certain items of work were later eliminated and their proposal was cut to \$1,380,000.00 (App. 379, 380). His company had not executed a written contract but believed it had an agreement (App. 382, 386, 388, 389). His company obtained estimates from subcontractors to support its proposal (App. 384). Pursuant to the understanding his company had purchased windows for this job. If the Arthur Venneri Company did not take the job, he would have had the Three Crowns Company, a non-union contractor of which he was also an officer, do so (App. 387). Materials were delivered to the job site to be used in the reconstruction as a modern office building including window frames and electrical conduits (App. 390).

In rebuttal, the government showed that on September 13, 1963, GSA authorized the removal from the property taken under condemnation of 249 window frames which were in crates (App. 500, 501). Owen, a real estate appraiser, testified over objection that in the fall of 1961 he had appraised the property for Merchants Transfer and Storage Company for \$1,000,000.00 and at that time he did not consider that the buildings were adaptable for office space (App. 502-508). He deemed the best use of the property to be for warehouse purposes until a modern type of structure was erected on it (App. 504). He was of the opinion that the best use of the site would be an office building (App. 512). An estimate of value of a building not then in existence is a frequent method of checking valuations (App. 512). If the lease to the government had been in existence at the time he made his appraisal, "it would have been one of the factors I would have considered" (App. 513). If the sale and lease-back commitment of the Woodmen of the World had existed, it would not have influenced him (App. 514). He did not feel these buildings lent themselves to conversion to a modern office structure (App. 514).

In further rebuttal, Scharf, a general contractor, testified that he had reviewed the plans and specifications for the remodeling of the buildings and estimated the cost would be \$1,737,550.00 (App. 521). Without fringe benefits the cost would be \$1,600,729.00 (App. 522). He estimated the reproduction cost of the front building as it existed as of January, 1963, at \$872,298.00 and the reproduction cost of the rear building at \$393,100.00. On the first building he estimated a 100% depreciation and on the second building a 50% depreciation (App. 524). If the buildings were remodeled in accordance with the plans and specifications, they would be fit for the proposed use and would carry the normal traffic load of people in an office

building (App. 527). It is not unusual for estimates and bids for construction work to vary by as much as 20% (App. 531). He admitted that this job could have been done under his estimate and completely satisfy all of the requirements for \$1,600,000.00 (App. 531).

In further rebuttal, Newbold, the President of Merchants Transfer and Storage Company, testified that the contract of sale for \$1,000,000.00 was submitted to, and approved by, his distinguished Board of Directors in reliance upon Owen's appraisal (App. 533).

Savage was recalled and testified that, taking into consideration the lease to the government and capitalizing its rental income, the reconstituted building would have a value of \$2,755,000.00 and, deducting his estimated cost of remodeling the building of \$1,712,000.00, the value of the buildings would be \$1,042,000.00 (App. 539). His construction costs might be reducible by \$300,000.00 or \$400,000.00 so on this basis value would be close to his original estimate of \$1,372,000.00 (App. 539). On cross examination he testified that he would still value the underlying ground as supporting a warehouse even though in fact it were supporting an office building, although he had never before appraised ground as having a warehouse on it when in fact an office building was on it (App. 552). Even if the building had been remodeled for office use in accordance with the plans and specifications, in his opinion its best use was not an office building (App. 552, 553).

The erroneous rulings of the Court below in the context of the testimony are discussed hereafter.

STATEMENT OF POINTS

1. The District Court was in error in prohibiting by pre-trial order the discovery of the appraisal reports of government experts.

The ruling of the District Court was wrong because (1) it violated the basic principle that the discovery rules should be given a broad and liberal treatment, (2) appraisal reports of experts in a condemnation case are not privileged, (3) they do not qualify as the "work-product" of a lawyer, and (4) it is not unfair or oppressive for the government to be required to disclose them in a condemnation case.

2. The District Court was in error in repeatedly ruling that a valid subsisting government lease of a substantial part of the property should not be considered by the jury as evidence of fair market value.

This lease was the most significant evidence in the case of the value of the property at the time of the taking and could not be ignored.

3. The District Court was in error in ruling that a contract of the owners with a life insurance company providing for a sale and lease-back of a substantial part of the property upon occupancy by the government under its lease might not be considered by the jury as evidence of fair market value.

Since this contract was valid, binding and subsisting, the jury was entitled to consider it with all other pertinent facts as bearing upon fair value.

4. The District Court improperly restricted the cross-examination of government expert Throckmorton.

The court below prevented counsel for the owners from adequately cross-examining this witness.

5. The District Court was in error in refusing to strike the testimony of government expert Throckmorton.

Throckmorton disregarded the government lease as an element of value and his valuation was made as

though no lease had been entered into with the government. In addition he testified that he considered the best use of the buildings on this property to be for a distribution house or a discount house, yet he did not even attempt to value the property on the basis of this claimed most profitable use.

6. The District Court was in error in its pre-trial ruling forbidding the owners to submit evidence of sums actually expended on renovation of the property.

Since the Court had permitted the government to show the purchase price paid by the owners for the property as bearing upon value, it should have permitted the owners to show their total cost as of the time of taking. This necessarily included expenditures made in good faith to improve the property.

7. The District Court was in error in refusing to permit the Owners to submit testimony in support of their Motion For a New Trial on the Ground of Newly Discovered Evidence and in denying the Motion.

SUMMARY OF ARGUMENT

1. *Discovery of the appraisal reports of government experts.* The District Court cases are in conflict as to the discovery of appraisal reports in a condemnation proceeding and this important question has not been determined by the Supreme Court or any Circuit Court of Appeals. The pre-trial order prohibiting the discovery of appraisal reports violated the established principle that the discovery rules authorize the broadest sweep of access. Although the rules protect material which is privileged, privileged material does not include more than communications between husband and wife, client and counsel, client and priest and trade secrets. An appraisal report of a real estate

expert cannot be deemed the "work product" of a lawyer. It is submitted to the triers of the fact, not as the work of a lawyer, but as the determination of an independent expert. The better reasoned District Court cases conclude that disclosure is not unfair or oppressive. The action of the Court below was improvident and affected substantial rights.

2. *The government lease on the property.* The District Court was in error in repeatedly ruling that a valid subsisting government lease of the buildings at an annual rental of \$389,000.00 could only be considered by the jury as evidence of highest and best use but not as evidence of fair market value. Under the lease the owners were required to remodel the warehouse buildings for office use. Plans prepared by architects and engineers for the owners were approved by GSA. The owners gave GSA a bond of \$389,000.00 guaranteeing performance and the lease contained a substantial liquidated damage clause for failure to perform within the allotted time. The necessary permits for the work were obtained from the municipal authorities and at the time of the taking the work was underway.

There was no evidence that the owners were unable to convert the buildings to office use and accordingly occupancy was reasonably probable and not conjectural.

Any potential buyer would necessarily consider the lease because as owner he would become entitled to the substantial rental provided for in the lease and he would be subject to its obligation to effect the conversion of the buildings. The erroneous rulings of the District Court denied the owners their Fifth Amendment right to have the jury determine fair

value upon consideration of all facts which a potential buyer would consider.

3. *The contract of the owners with the Life Insurance Company.* This contract provided for the sale of the buildings to the Woodmen of the World Life Insurance Society and their lease-back to the present owners upon occupancy by the government under its lease. The purchase price was \$2,800,000.00 or appraised value at the time of occupancy by the government, which ever was lesser. The lease-back by the Life Insurance Society to the owners was for a term of 25 years with a privilege to the lessee of electing 3-21 year renewal terms. Annual rental payable to the Life Insurance Society was an amount equal to 7.74% per annum upon the purchase price, i.e., \$216,720.00 at the purchase price of \$2,800,000.00. The test of admissibility of this contract as evidence of fair value was whether a buyer would take it into consideration in determining the price to be paid for the property. Since a prudent buyer would, of course, carefully evaluate the benefits of this contract, the ruling below, that the jury might not consider it as evidence of value were erroneous.
4. *Restrictions on the cross-examination of government expert Throckmorton.* Since the extent of these restrictions depend upon a careful consideration of each question asked upon cross-examination by counsel for the owners, no summary of them would be adequate. We respectfully refer the Court to our argument made hereafter at pages 44 to 48.
5. *The refusal of the Court below to strike the testimony of government expert Throckmorton.* Throckmorton disregarded the most important element of value, i.e., the valid, binding, subsisting lease of a substantial

part of the property to the government and his valuation was made as though no lease had been entered into with it. Accordingly the Court's refusal to strike Throckmorton's testimony violated established legal principles as to the admissibility of opinion evidence of real estate experts. They are not permitted to ignore and disregard any known factor of material significance affecting the value of property.

Throckmorton testified that he considered the best use of the buildings on the property to be for a distribution building or a discount house, yet he did not even attempt to value the property on the basis of his claimed most profitable use. He predicated his valuation upon the buildings continuing to be warehouses and the parking lot continuing as a parking lot. Since just compensation under the Fifth Amendment has been interpreted to mean the full fair market value of the property taken for public use considering its most profitable or best use, the inadmissible valuation of Throckmorton violated a Fifth Amendment right of the owners.

6. *The denial to the owners of the right to submit evidence of sums actually expended or renovation of the property.* The Court below made this formal pre-trial ruling upon the theory that the cost of a property plus the cost of improvements are rarely equivalent to fair market value. However, the Court permitted the government to show the purchase price paid by the owners for the property. If the purchase price was admissible as bearing upon the value, so were the ensuing expenditures of the owners. Cost must necessarily be deemed to include not merely an original purchase price but in addition expenditures made by owners in good faith to improve property. If this

were not so, an owner would not be entitled to show the full cost to him of property. The reversal by the Court below of its formal pre-trial ruling near the end of the trial came too late.

7. The Motion For a New Trial on the Ground of Newly Discovered Evidence and the Motion, supported by affidavits, asserted that the owners had ascertained that the Government's first choice real estate appraisers had made four separate appraisals each valuing this property in excess of \$2,000,000, the Government had disregarded them and then employed second choice experts who appraised the property at \$1,140,000 and \$1,372,000 respectively, and the Government submitted their testimony only to the Court and jury. The Answer of the Government did not deny these allegations of the Motion. In a Fifth Amendment taking case the Government is under a duty to disclose the appraisals of their first choice experts when so favorable to the owners and may not suppress them by soliciting a court order prohibiting the discovery of all appraisal reports of experts.

ARGUMENT

I

The District Court was in error in prohibiting the discovery of the appraisal reports of government experts.

In their pre-trial statement and at a meeting with counsel for the government, counsel for the owners indicated that they would seek discovery of the appraisals of the government's experts. After the filing of briefs, this issue was submitted by the parties to the Court at a pre-trial hearing on February 26, 1964. By pre-trial order, the District Court accepted the argument against disclosure made by the government and made the following ruling:

"10. Counsel for the Government and counsel for the owners will exchange names of the appraisers which each expects to call as witnesses. Appraisal reports will not be exchanged and no additional discovery pertaining to these expert witnesses will be allowed" (App. 11).

In deciding that the Court would not entertain, or permit, any discovery with respect to the appraisal reports of the real estate experts, the Court apparently relied upon an unreported order of District Judge Sirica in *District of Columbia v. All of Lot 803, Etc.*, D.C. No. 1-62,³ in which he denied a motion for the discovery of real estate appraisal reports on the ground that production would violate the rule that "the work product" of the lawyer is not subject to discovery.

It is submitted that the ruling of the District Court was erroneous.

1. The decision violated the basic principle that the discovery rules should be given a broad and liberal treatment to the end that the parties may obtain before trial as much information about the case as possible subject only to

³ The following cases permit discovery: *United States v. 23.76 Acres of Land*, 32 F.R.D. 593 (D.C. Md. 1963); *Cold Metal Process Co. v. Aluminum Co. of America*, 7 F.R.D. 425 (D.C.N.D. Ohio 1947), aff'd sub nom., *Sachs v. Aluminum Co. of America*, 167 F.2d 570 (6 Cir. 1948); *United States v. 62.50 Acres of Land, Etc.*, 23 F.R.D. 287 (D.C.N.D. Ohio 1959); *United States v. 1,278.83 Acres, Etc.*, 12 F.R.D. 320 (D.C.E.D. Va. 1952); *United States v. Certain Parcels of Land, Etc.*, 15 F.R.D. 224 (D.C.S.D. Cal. 1954); *United States v. 50.34 Acres of Land, Etc.*, 13 F.R.D. 19 (D.C.E.D. N.Y. 1952). *Contra*: *Lewis v. United Air Lines Transport Corporation*, 32 F. Supp. 21 (D.C.W.D. Pa. 1940); *United States v. 6.82 Acres of Land, Etc.*, 18 F.R.D. 195 (D.C. New Mex. 1955); *United States v. 7,543.04 Acres of Land, Etc.*, 18 F.R.D. 146 (D.C.N.D. Ga. 1954); *United States v. Certain Acres of Land, Etc.*, 18 F.R.D. 98 (D.C.M.D. Ga. 1955); *Hickey v. United States*, 18 F.R.D. 88 (D.C.E.D. Pa. 1952); *United States v. Certain Parcels of Land, Etc.*, 25 F.R.D. 192 (D.C.N.D. Cal. 1959). Cf., *United States v. 284,392 Square Feet of Floor Space, Etc.*, 203 F. Supp. 75 (D.C.E.D. N.Y. 1962) (allowing discovery as to facts only but ruling that term "facts" should be given a liberal interpretation), and *United States v. 19.879 Acres of Land, Etc.*, 27 F.R.D. 420 (D.C.E.D. N.Y. 1961) (allowing only an exchange of comparable sales).

limitations of relevancy and privilege. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947); 4 *Moore's Federal Practice* (2nd Edition, 1963), Sec. 26.25(3) p. 1545. It has been said that the discovery rules authorize "the broadest sweep of access." 2A *Federal Practice and Procedure, Barron and Holtzoff*, Sec. 793 p. 401, (1961 ed.). In *Hickman v. Taylor* at page 507, the Supreme Court said:

"We agree, of course, that the deposition—discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the state at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise."

An analysis of those cases, which deny discovery of appraisal reports, shows that discovery was denied for one or more of the following reasons: (1) discovery would destroy the attorney-client privilege, (2) discovery would violate the attorney-work product rule, (3) discovery would result in unfairness to the party from whom discovery is sought, (4) discovery would result in confusion, and (5) the information sought was equally available to both parties.

2. Although the discovery rules protect material which is privileged, the word "privileged" is interpreted as it is in the law of evidence.⁴ *Reynolds v. United States*, 345 U.S. 1 (1953); *Wild v. Payson*, 7 F.R.D. 495 (D.C.N.Y. 1946); 4 *Moore's Federal Practice*, Sec. 26.25(3) p. 1546; *Barron and Holtzoff*, Sec. 798, p. 441. In *Hickman v. Taylor*,

⁴ See Rule 26(b) Depositions; Rule 33 Interrogatories; Rule 34 Discovery and Production of Documents for Inspection; Rule 36(a) Requests for Admission.

the Supreme Court determined that even statements of a witness prepared by an attorney while acting for his client in anticipation of litigation is not privileged (p. 508). Since that decision, it has been established that discovery of documents cannot be denied upon the ground of privilege because they were prepared by or for counsel. Since privileged material does not include more than communications between husband and wife, client and counsel, client and priest and trade secrets, it is clear that a valuation report of a real estate expert is not privileged.

In the case of *United States v. 50.34 Acres of Land, Etc.*, above, the Court disposed of the question of an appraisal being privileged (p. 21).

"It is shown that the appraisal reports in question were obtained by the Government for the express purpose of determining the compensation which would have to be paid for purchase of the property in question; that these reports are in the possession and control of the Government; and that neither the reports nor the authors thereof are otherwise available to the moving party. There is nothing to indicate that these reports can be regarded as privileged matter."

3. An appraisal report of a real estate expert employed by a party to testify in a condemnation case is not the "work product" of a lawyer. Such a report does not constitute notes or memoranda of counsel reflecting his mental impressions of witnesses or private memoranda and personal recollections prepared by an adverse party's counsel in the course of his legal duties as were involved in *Hickman v. Taylor*. In that case (pp. 509, 510) the Supreme Court deemed such memoranda of counsel his "work product" and so *not* subject to discovery, pointing out that "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." The Supreme Court carefully re-

frained from laying down any general rule proscribing discovery of other documents obtained in anticipation of litigation or trial.

The formal written report of any real estate expert employed by a party to testify in an eminent domain proceeding, which is plainly relevant and not privileged, should not remain hidden in an attorney's file and discovery denied as "the work product" of counsel because only under the most abstruse and scholastic concept can such a report be so considered. In no realistic sense can it be deemed the private papers or private work of the attorney.

The attorney-work product rule has not been applied to expert opinion evidence in a number of recent decisions (See Foot Note 3). Indeed, the withholding by the government of an expert opinion favorable to a defendant in a criminal case is a denial of due process. *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964).

The Federal Advisory Committee's Report of June 1946, recommended the addition of the following final sentence to F.R.C.P. 30(b):

"The Court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions or legal theories, or except as provided in Rule 35 (examinations by physicians), the conclusions of an expert."

That proposed amendment was not adopted and never became the law.

4. Discoverability should be resolved, not in terms of the artificial "work product" doctrine, but in terms of fairness and feasibility of disclosure of adversary expert opinion. If discovery is to be denied, it should be done on

the ground that disclosure would be inherently unfair.⁵ In what respect is it unfair or oppressive or burdensome for the government to be required to disclose the valuations made by its experts in a condemnation case? Or, for the owners to be required to make a similar disclosure of its experts to the government? In neither case is there any element of unfairness or oppression.⁶

Judge Winter, in *United States v. 23.76 Acres of Land, Etc. supra*, stated that the more modern and better-reasoned cases which deny discovery in this area do so on the ground of unfairness. He stated (p. 957) that any discussion of unfairness should begin with a consideration of the issues presented in a federal condemnation case. The Federal government may institute suit without notice and obtain title the same day even before the property owner is aware that the government requires his property. The sole issue is usually just compensation and as it is generally pure fiction to think that the property owner knows the value of his own property so the litigation becomes a battle of experts. He concluded:

"Where value is the basic, if not sole, issue in litigation, it is not unfair for either party to know in advance of trial what the other party intends to prove, what opinions his opponent's experts hold, the methods by which those opinions were formulated, and the facts upon which they are based. These are all matters to be presented to the trier of the facts at trial. Mutual

⁵ Louisell, *Modern California Discovery* (1963) p. 1331; Friendenthal, *Discovery and Use of an Adverse Party's Expert Information* 14 Stan L Rev. 455, 488 (1962).

⁶ The taking of the deposition of an adverse expert witness may have an element of unfairness because the expert has not been employed and compensated for that additional work by his employer. It may be, therefore, that the deposition of an adverse expert should only be permitted upon condition that the examining party compensates him. In any event this problem does not arise in connection with the issue before the court, i.e., the right of discovery of a written appraisal of a government real estate expert in a condemnation case.

knowledge of all the relevant facts gathered by both parties is essential to proper litigation."

5. The objections of confusion and availability of information as reasons for denying discovery are also unsound and ill-reasoned. Full discovery of all material facts upon which just compensation may be determined serves to satisfy the basic purpose of discovery by avoiding confusion and surprise.

6. The discovery methods sanctioned by the Federal Civil Rules include the taking of oral and written depositions (Rules 26-32), interrogatories (Rule 33), and production of documents (Rule 34). The pre-trial order prohibited counsel for the owners from attempting to obtain discovery of the appraisal reports of the real estate experts of the government by any of these methods. It would, therefore, have been a contempt of court for counsel for the property owners to have attempted further to obtain discovery of the appraisals of government experts by motion, interrogatories, or depositions.

The only pertinent rule which requires a showing of "good cause" is Rule 34. In determining "good cause", a liberal construction is desirable, considerations of practical convenience are important and the Court should be satisfied that the production of the requested document will facilitate proof or aid in the progress of the trial or if necessary to enable a party to prepare his case. 2A Barron and Holtzoff, Sec. 796 pp. 417, 418. Good cause may consist merely of a showing that the documents are germane to the subject matter of the action; that the designated documents probably contain material evidence. A2 Barron and Holtzoff, Sec. 796 pp. 420, 421.

In the case of *United States v. Certain Parcels of Land*, 15 F.R.D. 224 (S.D. Cal. C.D. 1954), the Court discussed the concept of "good cause" as it relates to appraisals

in a condemnation proceeding. The Court stated that one might reasonably expect to find in appraisal reports information not disclosed by public record relevant to transactions involving property comparable to that sought to be condemned. The information would appear reasonably calculated to lead to the discovery of evidence which would be admissible at the trial, might lead to the discovery of evidence of transactions involving comparable property which Defendants' experts could cite on direct examination in giving reasons for their opinions as to value, might afford a basis for, or tend to, corroborate the opinion testimony of experts called by Defendants as to the value of the property in question, and the factual portions of the appraisal reports might afford a basis for cross-examination of Plaintiffs' appraisers if and when called. The significant conclusion of the Court is quoted in the Brief Appendix.

Where the primary issue is just compensation determined primarily by expert witnesses, nothing could be more germane to the issue than the appraisals upon which such expert testimony is based. Every sensible, practical reason favors disclosure of appraisal reports; none denies it. Accordingly good cause is inherent in any request or motion for access to appraisal reports in a condemnation case. In any event the District Court's definitive prohibition precluded any effort to even show good cause.

7. No decision of the Supreme Court or of any Circuit Court of Appeals has determined that appraisal reports of government experts in a condemnation case are *not* subject to discovery. The District Court decisions against discovery will be found to be ill reasoned and in conflict with the basic and liberal purposes of the discovery rules. The decision of Judge Walsh in this case and the earlier decision of Judge Sirica (1) deny the fundamental theory and purposes of discovery, (2) conflict with the better reasoned District Court opinions, and (3) violate the liberal approach

accorded by some state courts to state rules including Maryland, California, and Arizona.⁷

An order for or against discovery is interlocutory and so not reviewable until appeal from final judgment.⁸ An appellate court will not ordinarily disturb the discretionary action of a trial court with respect to pre-trial discovery orders unless the action was improvident or affected substantial rights.⁹ The discretion vested in the trial judge, we submit, is as nebulous as "fairness" or "in the public interest" or "justice" itself. Chief Justice Holt once said "discretionary" was "but a softer word for arbitrary." *Walcott's Case* 90 Eng. Rep. 1275 (1793). However discretion may be defined, it must be interpreted as requiring a sensible, reasonable, fair action and the pre-trial order prohibiting discovery in any form of the appraisal reports of government experts was not fair and was not reasonable.

It is submitted that the action of the Court was improvident and affected substantial rights. The Motion for a New Trial on the Ground of Newly Discovered Evidence asserted that in this case the United States had employed Harps and Fisher, two well qualified real estate appraisers, who had each appraised the property for the government in excess of \$2,000,000.00, that they had then been requested by the government to make new appraisals disregarding the lease of the premises to GSA for office space for the Department of Labor. The appraisers then made new separate appraisals disregarding the lease but they

⁷ Md. Rules, Sec. 410c(2) and 410d; *U.S. v. 23.76 Acres of Land*, above, in which Judge Winter states that under Maryland law and in Maryland state courts full discovery as to expert witnesses is permitted in condemnation cases (p. 597). *Oceanside Union Sch. Dist. v. Superior Court*, 58 Cal. 2d 180, 373 P.2d 439 (1962); *San Diego Professional Assn. v. Superior Court*, 58 Cal. 2d 194, 373, P.2d 448 (1962); *State ex rel Willey v. Whitman*, 91 Ariz. 120, 370 P.2d 273 (1962).

⁸ *Zalutke v. Metropolitan Life Ins. Co.*, 108 F.2d 405 (7th Cir. 1939); *Apex Hosiery Co. v. Leader*, 102 F.2d 702 (7th Cir. 1939).

⁹ *Carter v. Baltimore RR Co.*, 152 F.2d 129 (App. D.C. 1945); *Tiedman v. American Pigment Corporation*, 253 F.2d 803 (4th Cir. 1958).

again found a valuation in excess of \$2,000,000.00. The United States then disregarded these appraisals and employed second choice experts, Throckmorton and Savage, who testified at the trial to values of \$1,140,000.00 and \$1,311,750.00 respectively. The Answer of the government to the Motion for New Trial did not deny the facts alleged in the Motion (App. 615).

At the hearing on the Motion, the government objected to any testimony of Harps and Fisher as to their appraisals although present in Court under subpoena and the District Court declined to hear them (App. 623). The Motion for New Trial on the Ground of Newly Discovered Evidence raised the grave constitutional question whether in a condemnation case involving the right of the property owners to just compensation under the Fifth Amendment, it was a violation of due process for the government to withhold the appraisals of Harps and Fisher when their valuations were far in excess of those submitted by the government to the jury.

Moreover this was a "quick take" under Dist. of Col. Code (1961 ed.) Sec. 16-628 permitting the government unilaterally to acquire immediate title and possession upon payment into Court of the government's "estimate of just compensation." If, as we contend, the government paid into Court far less than the appraisals then in its files, there was at the outset of the proceeding a violation of due process and a Fifth Amendment right of the owners.¹⁰

Under such circumstances the Court should conclude that the pre-trial order, prohibiting discovery of the reports of the government experts, was improvident and did affect substantial rights. If discovery had been permitted, coun-

¹⁰ The Motion for New Trial alleged that Throckmorton and Savage were not hired to make their low appraisals until after the much higher appraisals of Harps and Fisher (App. 606).

sel for the property owners would have known of the valuations made by all government experts and the methods utilized by them and they would undoubtedly have subpoenaed at the trial Harps and Fisher instead of making the natural assumption that their valuations would merely confirm those of Throckmorton and Savage. In that event, there could not have developed the issue of due process consequent upon the government's withholding of the reports of Harps and Fisher. Accordingly, the decision of this Court in *Carter v. Balto. & O.R. Co.*, above, where this Court did not disturb the negative discovery action of the District Court, is not pertinent. If substantial rights were not involved in the case at bar, no pre-trial order as to discovery would seem reviewable.

II

The District Court committed prejudicial error in repeatedly ruling that the subsisting lease on the property to the government should not be considered by the jury in determining the fair market value of the property.

Throughout the trial of this condemnation case it was the position of the District Court that a distinction must be made between the highest and best use of a property and its fair market value and the government lease on the property was admissible to show the highest and best use of the property but was not admissible as an indicia of market value. These rulings at pre-trial, at trial and in the Court's charge to the jury were erroneous.

A

THE RULINGS OF THE DISTRICT COURT AS TO THE LEASE

At a pre-trial hearing counsel for the owners argued orally and in their brief that the jury were entitled to consider the government lease and the rental provided for therein, together with all other relevant factors, in deter-

mining fair value and accordingly the lease was admissible as evidence of fair market value. Counsel for the government argued orally and in their brief that the lease was not admissible for any purpose. The government's principal contention was that, since the lease contemplated the remodeling of the premises into an office building, which was uncompleted at the time of the taking, it represented merely a speculative future possibility.

The District Court ruled in its pre-trial opinion filed March 4, 1964, that the lease would be admitted to show "the highest and best use" of the property provided the owners could show that (1) the bids for rental of space were solicited and received on a competitive basis resulting in the lease or (2) the government paid a fair market rental and not an enhanced price which its demand alone had created. The District Court later interpreted its pre-trial ruling as meaning that the government lease could be offered in evidence to show "highest and best use" *only* and not for the purpose of showing fair market value of the property (App. 6, 10).

At the trial, when the government lease was offered in evidence, the District Court clearly stated that it was being admitted in evidence "on the basis of highest and best use only" (App. 61). In an ensuing colloquy at the Bench government counsel claimed that counsel for the owners were attempting to "utilize this lease as an indicia of value, contrary, I respectfully submit to your Honor's ruling as I understand your Honor's ruling. They would be entitled to show this lease for the purpose of indicating the highest and best use of the property as I understand your ruling. I believe, and I respectfully submit, that he is going beyond that and indicating a possible indicia of value . . . " (App. 64). Counsel for the owners adhered to their pre-trial position that the lease was admissible as evidence of value (App. 62-67).

Later there occurred this colloquy *before the jury*:

"(Mr. Liotta) Excuse me. May I now request Your Honor if you would, sir, to have an instruction to the jury that this lease is for the purposes of highest and best use, and not indicia of value?"

(The Court) The Court will instruct the jury at a later time. The Court has already stated that the lease has been received in evidence *solely* for the purpose of highest and best use, and that is all you are offering it for.

(Mr. Yochelson) Yes.

(The Court) All right.

By Mr. Yochelson:

Q. Mr. Throckmorton, in your judgment, did the existence of this lease on the date of the taking by the government increase the fair market value of the property?

(Mr. Liotta) Objection, Your Honor.

(The Court) The objection is sustained.

The Court understands, Mr. Yochelson, that you agree that you are not introducing the lease to show the fair market value. You are doing that to show the highest and best use of the property.

(Mr. Yochelson) If Your Honor please, it seems to me the lease is in evidence to show its highest and best use.

(The Court) Yes.

(Mr. Yochelson) We contend its highest and best use is an office. We contend there was a lease in existence.

(The Court) Yes.

(Mr. Yochelson) We contend that a buyer, a willing buyer on that date, having such a lease and buying this property for its highest and best use would pay a price different than they would pay if there were no such lease.

(The Court) Mr. Yochelson, there are assumptions in that statement that you have just got through making that the Court does not agree with at all. The government may want this particular property. This witness may be talking about the highest and best use for commercial purposes.

(Mr. Yochelson) I have only stated and I have asked—

(The Court) The Court has already received it on the basis that you can show the highest and best use, Mr. Yochelson, *but not as an indication of the fair market value so far as money is concerned on just compensation.*

(Mr. Yochelson) I do not see how we can separate the two. If the Court please.

(The Court) Just a moment. That is not for you and that is not for me. That is for the jury to determine.

(Mr. Yochelson) The Court please, may we be permitted to argue this in the absence of the jury? I think it is of vital importance.

(The Court) The Court is of the opinion that it has already been argued.

(Mr. Yochelson) Very well'' (App. 74, 75).

Mr. Yochelson, counsel for the owners, was compelled to say that the lease was in evidence to show the highest and best use of the property because the pre-trial opinion had ruled that the lease could only be offered for this purpose. However his later comments made clear that he was adhering to his pre-trial position that the lease should have been admitted as an indicia of value.

Thus the District Judge reiterated in the presence of the jury that the government lease was admitted solely to show the highest and best use of the property but it was not admitted as an indicia of value. He not only made this perfectly clear to the jury but he foreclosed further argument on the matter. In addition the District Judge made

similar rulings before the jury to the same effect (App. 65, 67, 146, 147, 148, 412, 440).

Later in the trial Defendants' expert, Mack, testified to his valuation of the property which took into consideration the government lease, the rental provided for therein, and the estimated cost to the owners of remodeling the building. Government counsel moved at the Bench that Mack's testimony be stricken. The District Judge said at the Bench "It is difficult for the Court to understand why he would come in here and testify in view of the fact that it is conceded by all parties that the lease and sale are introduced solely for highest and best use" (App. 439, 440). Although the Court denied the motion to strike his testimony (App. 440), the District Judge made clear that he was still adhering to his ruling that the lease was admissible solely to show "the highest and best use" of the property. The District Judge's statement that counsel for the owners had conceded the correctness of this ruling is not consistent with the facts. After the District Court's definitive pre-trial ruling, counsel for the owners had no alternative at the trial but to attempt to comply with it.

The charge to the jury of the District Judge continued to emphasize that a clear distinction must be made between just compensation to be measured by the fair market value of the property on the one hand and the highest and best use of the property on the other hand. The Court instructed the jury that fair market value meant the amount of money for which the property would have sold on January 18, 1963, the date of the taking, by a willing buyer and a willing seller (App. 593), and further "the owner is only entitled to be put in as good a position pecuniarily as if his property had not been taken by the government to the extent of fair market value" (App. 593). *In considering fair market value no allowance should be given or compensation made for any frustration of the personal plans of the land*

owner of any opportunities the land owner might have lost by reason of the taking of his land (App. 593). No consideration should be given for any inconvenience or hardship that might have been occasioned any land owner by the taking of his property nor for any interference with his business or loss of future profits that might be sustained by him nor for any other indirect or consequential damage the owner might suffer indirectly (App. 594).

The Court further instructed the jury that compensation to the owner was to be estimated by reference to the use for which the property is suitable. A special value of the land due to its adaptability for use in a particular purpose was an element which the owner is entitled to have considered by the jury in determining the amount to be paid in just compensation. "However, mere physical adaptability of the property for a particular use is not sufficient without showing by a preponderance of the evidence of the market demand of the property for the particular use for which the property owner contends the property has as of the date of the taking" (App. 594).

The Court instructed the jury that it should consider all elements *for the highest and best use* for the property, including the lease to the United States as well as the sale to the Woodmen of the World and the lease-back to the property owners and all other elements (App. 595). In considering the available uses to which the property might be adapted or developed to the highest and best use, the question is what an ordinary businessman would do, not necessarily what the land owners claim or indicate that they would do. "*While consideration may be given to the highest and best use to which the property could be developed or shows adaptability on January 18, 1963, fair market value is to be determined for the property as it was on that date taking into consideration the highest and best use*" (App. 596).

In other words the District Judge made it clear to the jury his continuing theory, which he had maintained from the outset, that the jury could consider as to the highest and best use of the property all elements, including the lease to the United States and the sale to the Woodmen of the World and lease-back to the property owners, but in determining fair market value (1) no compensation would be made for any frustration of the personal plans of the land owners or any opportunities the land owner might have lost by reason of the taking, (2) no consideration should be given for any hardship occasioned the land owner or for any interference with his purposes or for any other destruction or consequential damage the owner might suffer indirectly, (3) while compensation was to be estimated by a reference to the use for which the property was suitable, adaptability of the property for a better use was not sufficient without a showing by a preponderance of the evidence of a market demand for that particular use, and (4) although consideration might be given to the highest and best use to which the property could be adopted on January 18, 1963, the date of taking, fair market value was to be determined for the property *as it was on that date* considering the highest and best use.

Each of these four instructions above, not only failed to correct the error of the repeated trial rulings, but compounded it by in effect directing the jury to disregard the government lease as an element of fair market value.

Defendants' requested Instruction No. 4 read as follows:

"You must consider all elements that might affect the fair market value of the property including the lease to the United States, the sale—leaseback to the Woodmen of the World, and all other elements as might influence a reasonably prudent person interested in purchasing the property" (App. 559).

In the discussions of instructions counsel for the government objected to it as "in direct derogation of Your Honor's pre-trial ruling" (App. 561). The District Court then ruled that he would substitute for the words "you must consider all elements that might affect the fair market value of the property" the words "you must consider all elements for its highest and best use" (App. 562). Counsel for the owners objected on the record to the denial of their requested Instruction No. 4 (App. 562).

It is submitted that the requested instruction should have been granted because it made clear that in determining market value the jury must consider all elements including the government lease. The Court emasculated the instruction by omitting from it the critical words "that might affect the fair market value of the property," thus continuing to make the fatal distinction that the Court had made throughout the trial, namely, the government lease might only be considered in relation to the highest and best use of the property but not as an indicia of value.

B

THE RULINGS OF THE DISTRICT COURT WERE WRONG

The Supreme Court has established that in an eminent domain case just compensation, i.e., fair market value, "includes *all* elements of fair value that inhere in the property", "considering *all* the circumstances" and there should be taken into account "*all* considerations that fairly might be brought forward and reasonably be given substantial weight" by an owner willing to sell and a purchaser desiring to buy. "The determination is to be made in the light of *all* facts affecting the market value that are shown by the evidence taken in connection with those of such general notoriety as not to require proof" (emphasis added). *Olson v. United States*, 292 U.S. 246, 255, 257 (1934).

Rental value has always been deemed admissible in determining market value of real estate. When property is leased for the use to which it is best adapted, the capitalization of the rent is deemed one of the best tests of value and accordingly evidence of the lease and its rental should be admitted. *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *United States v. Michoud Industrial Facilities*, 322 F.2d 698 (5th Cir. 1963); *North American Telegraph Co. v. Northern Pacific Ry. Co.*, 254 F. 417 (8th Cir. 1919) cert. denied 249 U.S. 607; *United States v. Shingle*, 91 F.2d 85, 89 (9th Cir. 1937) cert. denied 302 U.S. 746; *United States v. Certain Land in Newark*, 183 F.2d 320, 322 (3rd Cir. 1950); *Chicago B & Q R. Co. v. North Kansas City Development Co.*, 134 F.2d 142, 152 (8th Cir. 1943); *United States v. Waterhouse*, 132 F.2d 699 (9th Cir. 1943), affirmed 321 U.S. 743; *Lewis v. TVA*, 108 F.2d 95 (6th Cir. 1939) cert. den. 309 U.S. 688; *Kelchner v. Kansas City*, 86 Kan. 762 (1912); *City of St. Louis v. Rossi*, 333 Mo. 1092 (1933); *Northern Pacific Railway Co. v. North Am. Tel. Co.*, 230 F. 347 (8th Cir. 1915); *United States v. Certain Parcels of Land*, 63 F. Supp. 175 (D.C. S.D. Cal. 1945); *United States v. 15.3 Acres*, 154 F. Supp. 770 (D.C. M.D. Pa. 1957); 5 Nichols, *Eminent Domain* (3rd ed.) 12.42 p. 291.

An additional principle which has been established is that the special value of property, due to its adaptability for a particular use, is an element which the owner is entitled, under the Fifth Amendment, to have considered in determining the amount to be paid as just compensation upon a taking by eminent domain. *Mitchell v. United States*, 267 U.S. 341, 344 (1925); *City of New York v. Sage*, 239 U.S. 57, 61 (1915); *The Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 408 (1879). When adaptability to a particular use is evidenced by a contract, that agreement is so essential that, under the concept of market

value defined by the Supreme Court as the "practical standard" by which the constitutional requirement of just compensation to the owner is determined, the agreement is relevant and admissible. *United States v. Certain Parcels of Land in City of Philadelphia*, 144 F.2d 626, 629 (3rd Cir. 1944) holding that a written contract for the sale of the condemned property was admissible as bearing upon market value. Since reasonable perspective earning power is an important factor in determining just compensation, the rental terms of an existing lease are, of course, relevant to determination of market value. *Atlantic Coast Line R. Co. v. United States*, 132 F.2d 959, 963 (5th Cir. 1943) and cases cited above.

The mere fact that the government was a party to the lease does not impeach the validity of the evidence of value represented by a lease and its rental terms where the lease was not made in connection with, or in anticipation of, condemnation proceedings. *Slattery Company, Inc. v. United States*, 231 F.2d 37, 41 (5th Cir. 1956). There the court defined the proper rule that prices paid in settlement of condemnation proceedings, or the sum paid by the condemnor for similar land even if proceedings had not been begun, are not admissible because such payments are in the nature of compromise to avoid the expense of condemnation litigation and so not a fair indication of market value. However, purchases by the condemnor which were not in connection with, or in anticipation of, condemnation are admissible. To the same effect 18 Am. Jur. *Eminent Domain* Sec. 352, p. 996; *Washington Home for Incurables v. Hazen*, 70 F.2d 847 (C.A. D.C. 1934) where evidence of prior government purchases of comparable land was held admissible as bearing upon market value. The court adopted the Massachusetts rule that was defined by then Judge Holmes in *O'Malley v. Commonwealth*, 182 Mass. 196, 198 (1902), namely, "We cannot say merely because

of the name of the purchaser that the sale is not a fair transaction on the market rather than a compulsory settlement. The Board has power to purchase as well as to condemn land." *Hannon v. United States*, 131 F.2d 441 (D.C. Cir. 1942); *Eames v. Southern New Hampshire Hydro Electric Corp.*, 85 N.H. 379 (1932); *Shaw v. Monogahela R. Co.*, 110 W. Va. 155 (1931); *Curley v. Jersey City*, 83 N.J.L. 760 (1912); Cf. *Hanson Lumber Company v. United States*, 261 U.S. 581 (1923).

In the exceptional situation where the Government is required to purchase or lease property at an exorbitant price by reason of a national emergency, the proffered transaction has been deemed inadmissible on the ground that it arose from governmental necessity and, therefore, did not reflect true market value. *United States v. Cors*, 337 U.S. 325, 333 (1949); *Carlstrom v. United States*, 275 F.2d 802, 808 (9th Cir. 1960). See Brief Appendix for a summary of these cases.

The distinction here was recognized by the Court of Appeals for the District of Columbia in *Washington Home for Incurables v. Hazen*, where evidence of prior government purchases of comparable land was deemed admissible as bearing upon market value. A similar distinction was made in *Hanson Lumber Company*, above, where the Supreme Court held that resolutions, adopted by a corporate owner indicating an agreement of sale with the government at a particular price prior to the taking and the condemnation proceedings, were entitled to be considered as evidence of value of the property. In *Olson*, above, where the Supreme Court held that the owners were not entitled to any increment resulting from a related eminent domain taking, the Court said "to the extent that probable demand by prospective purchasers or *condemnors* affects market value, it is to be taken into account" (p. 256).

The District Court's reason for exclusion of the government lease as a criteria of value was that the remodeling into office buildings as required by the lease had not been completed at the time of the taking on January 18, 1963 and accordingly the lease could only be received in evidence to show the highest and best use of the property (App. 5, 10). In effect the District Court accepted the government's contention that, since the contemplated remodeling had not been completed at the time of taking, the lease to G.S.A. was merely a hypothetical conjectural future possibility.

There is no doubt that, when future occurrences are merely within the realm of possibility but are not fairly shown to be reasonably probable, they should be excluded from consideration; occurrences which are merely speculation and conjecture may not become a guide for consideration of value. *Olson v. United States*, p. 257, above. On the other hand evidence is admissible of all the uses for which the property is suitable. *Olson* p. 255. "Value may reflect not only the use to which the property is presently devoted but also that use to which it may be readily converted." *United States v. Powellson*, 319 U.S. 266, 275 (1943). Accordingly, admissibility of the lease as evidence of value depended upon a showing that the adaptability of the property for an office building was "reasonably probable". *United States v. Waterhouse*, above, where a witness was permitted to testify as to the value of the condemned land if converted to a development for houses although it was, at the time of the taking, used as a farm. In *Mississippi and Rum River Boom Co.*, above, the Supreme Court held that the adaptability of land for boom purposes was a circumstance that should have been considered. This "reasonably probable" use is not, as the District Court ruled, admitted only "to show the highest and best use of the property" but it is admitted as an

element in the determination of market value. *McCandless v. United States*, 298 U.S. 342 (1936) 18 *Am. Jur. Eminent Domain* Sec. 249). In other words just compensation does not depend upon the use to which the owner had devoted the property but upon consideration of all uses to which it is suitable. *Atlantic Coast Line R. Co. v. United States*, 132 F.2d 959 (5th Cir. 1943); *McCandless v. United States*, above. All that is required is that there be a "sufficient likelihood" before the contemplated use may be shown. *Iriarte v. United States*, 157 F.2d 105 (1st Cir. 1946).

In the case at bar the owners did not ask the court to entertain evidence as to the value of the property if it should be at some future time per chance remodeled into an office building. Here there was a valid, binding, subsisting lease to the government obligating the owners to remodel the buildings into office buildings in accordance with elaborate plans prepared by architects and approved by the owners and the government. The owners had posted a bond in the amount of \$389,000 to effect the conversion. The necessary permits had been obtained from the Municipal authorities to do the work. The work had been actually undertaken.¹¹ There was no evidence that the owners were financially unable to effect the required remodeling of the buildings or for any other reason they were unable to accomplish it. The intended use of the property for an office building under lease to the government was not a conjectural possibility but was a project which was already underway.

The situation here is far stronger than that in *United States v. Certain Lands in Stratford*, 113 F. Supp. 465 (D.C. Conn. 1952) aff. *United States v. Hirsh*, 206 F.2d 289 (2nd Cir. 1953) where the government condemned an

¹¹ The owners had pulled out the lavatories, the heating plant and the elevators and had had reinforcing rods delivered on the job; they had cleared the building to some degree. (App. 141). Materials had been delivered to the job site, including 249 window frames and electrical conduits (App. 390).

air craft plant. The owner had entered into an agreement with an air craft engine builder giving the latter an option to lease the plant for two years with an additional option for three years more. The triers of the facts in their award found that a prospective buyer of the property would have assumed that this contract would be fulfilled. The District Court held: (p. 467) "Certainly such pending lease probabilities are elements to be considered in arriving at fair market value . . . "

If a "willing buyer" is entitled to assume that an option will be exercised, he certainly is entitled, when a binding lease has been made and the owner has commenced work to fulfill conditions precedent to occupancy, to consider the lease in determining the amount he would pay for the property. Since any willing buyer of this property would have taken the property subject to the benefits and obligations of the lease, including the substantial expenditures to be made for its conversion into an office building, how could he be expected to disregard it?

When the District Court repeatedly ruled that the lease freely negotiated between the government and the owners, unrelated in any way to the later taking, was not admissible as evidence of value, the District Court improperly usurped the prerogatives of the jury. The jury was denied its exclusive function to determine the weight which should be given to the lease, its rental terms and the cost of the remodeling. It was for the jury to decide the fair market value of this property and, in doing so, to consider all circumstances, including, of course, such a conceded fact as the lease and its terms. Accordingly the erroneous rulings of the District Court denied the owners their Fifth Amendment right to have such a determination made by the triers of the facts.

III

The District Court committed prejudicial error in ruling that the contract of the Woodmen of the World Life Insurance Society might only be considered by the jury as evidence of best use.

The Agreement for the sale to the Life Insurance Society, upon completion of the remodeling and occupancy by the government, for not more than \$2,800,000.00 or its then appraised value, related only to the buildings and the land under them, i.e., 20,000 square feet. The additional 15,000 square feet of vacant land would remain the property of the present owners (App. 308 Hendrickson). Under the agreed lease-back to the present owners, they were entitled to the rental under the government lease (which also excluded the vacant land) of \$389,000.00 as compared with a rental payable by the present owners to the Life Insurance Society of \$216,720.00 (App. 318 Hendrickson). The Life Insurance Society estimated that, after the present owners paid maintenance expenses and fixed charges, they would have net excess income from the buildings under the lease of \$66,000.00 (App. 304 Hendrickson).

In its pre-trial opinion and order the District Court ruled that the Agreement dated November 8, 1962, between the owners and this Life Insurance Society would only be admitted in connection with highest and best use (App. 6-8, 10). In his charge the District Judge accorded the Agreement the same treatment as he did the lease, namely, it could be considered as evidence of best use (App. 595). He refused Requested Instruction No. 4 of the owners which stated that the government lease and the Life Insurance Society Agreement should be taken into consideration in determining fair value (App. 559-562).

It is submitted that all we have said in our preceding argument with respect to the lease should apply to this

Agreement. The Agreement for the purchase of the property and its lease-back to the owners, executed by both the Life Insurance Society and the owners, constituted a valid, binding, subsisting contract. It was neither an offer nor an option. Accordingly, it is submitted that the rulings with respect to this Agreement, as well as the charge to the jury with respect to it, were erroneous. Here again the District Court usurped the prerogatives of the jury and denied the Owners their Fifth Amendment right to have the weight to be accorded this Agreement determined by the triers of the facts.

IV

The District Court committed prejudicial error in improperly restricting cross-examination of government expert, Throckmorton.

Although a sound policy requires a wide latitude in the cross examination of hired real estate experts who value property in a condemnation case, the District Court constantly interfered with the cross examination of government experts sustaining objections by government counsel to questions which were plainly permissible, proper and indeed essential.

In cross-examining Throckmorton, counsel for the owners were not permitted to develop whether he had discussed his appraisal with other appraisers employed by the government (App. 56). Surely the jury was entitled to know whether his valuations constituted his own independent work product or whether he had collaborated with Savage or others, and if so, the extent of that collaboration and the degree to which he might have been influenced by the judgment of others.

On direct examination Throckmorton had testified that he had made his valuation of \$1,140,000 upon the assump-

tion that the improvements would continue to be used as a warehouse and the vacant lot would continue to be used as a parking lot (App. 54, 55, 79, 80, 81, 88, 96). He appraised it as he found it, and valued it as a warehouse and valued it for warehouse purposes (App. 79). Throckmorton testified that he knew of the government lease and had read it (App. 58) yet he excluded the use of the property as an office building in making his valuation and explained why (App. 57, 58). When the owners attempted to cross-examine Throckmorton on his reasons for disregarding the Government lease with its annual rental of \$389,000 a year, they were not permitted to do so (App. 59). Later the Court did permit some answers relative to this subject, i.e., Throckmorton's claims of the high risk involved, uncertainty whether the building would be completed, the figures were hypothetical (App. 61, 96), the building was not there (App. 96). But the owners were not permitted to develop whether this expert knew at the time of his appraisal that the owners were actually engaged in converting the building into an office building (App. 60).

The owners were not permitted to inquire whether the existence of the government lease at the time of the taking did not enhance the fair market value of the property (App. 74, 141). Although Throckmorton claimed that no individual tenants would rent space in the building (App. 74), the owners were not permitted to then ask him "You said that even though the government did rent it?" (App. 75). Counsel for the owners were not even allowed on cross to ask "If you knew that there was a lease on this building with an extremely low rental, would you have taken that into consideration?" (App. 97). Although the credibility and reliability of an opinion of an expert are in issue whenever an expert testifies, the District Court, in sustaining an objection to this question on cross examination, refused to permit counsel for the owners to inquire whether

Throckmorton's failure to consider the government lease on the property was influenced in whole or in part by the amount of the annual rental of \$389,000 a year. The jury was entitled to know this. And particularly when the witness testified that he had appraised buildings not yet built for mortgage lending purposes, i.e., buildings to be constructed in the future (App. 121) and in such cases he had considered leases depending on the maker, their length, their stability and the lessee (App. 121, 122).

After Throckmorton had testified to his opinion as to land values, namely, he valued the land on E Street at \$35.00 per square foot—\$794,244 (\$874,000 less \$80,058 representing the cost of razing (App. 82, 83, 97, 98)), he proceeded to value the parking lot at \$23.23 per square foot. He accomplished this by capitalizing the rental provided for in a subsisting lease of the parking lot although he did not even know the length of the lease (App. 93). In other words Throckmorton valued the land used for a parking lot by capitalizing the rental in an existing lease on the parking lot when this valuation method resulted in a low valuation but he disregarded the government lease on the buildings when capitalization of its rental might lead to a much higher valuation. Yet the District Court did not permit counsel for the owners to ask him "Do you think this [the value of the parking lot] is the fair market value of that land unimproved?" (App. 97). Nor did the District Court allow counsel for the property owners to ask Throckmorton "Do you think this is the fair market value of that land unimproved today or at the date of taking" (App. 97).

The length to which the District Court protected this government witness is best indicated by its refusal to permit counsel for the owners on cross examination to ask Throckmorton "This valuation assumes that the improvements have no value but on the contrary their existence is a

detriment?" (App. 97). Objection was sustained to the question "Do you consider that the cost to them [the owners] as of the date of the taking was greater than at the date of acquisition?" (App. 114).

According to Wigmore¹²

"Every human assertion offered testimonially, i.e., as evidence of the truth of the fact asserted must be subjected to 'cross-examination to test the truth of the assertion'.

"The test of cross-examination is found by experience to provide the most powerful means of ascertaining the circumstances which affect the trustworthiness of the witness' assertion. The mere assertion of the witness, especially when he is a partisan, leaves undisclosed innumerable details which may affect his grounds of knowledge, his interest, his bias, his character, and the supplementary and qualifying facts of the issue."

In the case of a partisan real estate expert hired by the government or by the owner to testify to the value of property in a condemnation case, the widest scope of cross-examination is required. Otherwise the bare assertions of an expert, however spurious in fact, cannot be challenged. This is particularly so in the case of urban commercial real estate where the only source of value depends upon the logic and reliability of the opinions of experts.

It is Appellants' position that each of the inquiries, above, was not only permissible on cross-examination but was essential to test the validity and bias of this real estate expert's testimony. When the District Court repeatedly sustained objections to these proper questions, the Court left undisclosed to the jury many matters which affected the credibility, the knowledge, the bias and the character of this witness. Worse still, the District Court

¹² Wigmore's Code of Evidence p. 259 (3rd ed.).

left the jury under the impression that counsel for the owners were improperly attempting to pry into irrelevant matters and that the Court was favorably impressed with the testimony of the witness.

The scholastic rulings of the District Court in restricting cross-examination of this government expert and denying access by counsel for the owners and the jury to important matters of impeachment constituted prejudicial error.

V

The District Court committed prejudicial error in refusing to strike the testimony of government expert Throckmorton.

Counsel for the owners moved to strike the testimony of Throckmorton (App. 80, 85, 142). The denial of these motions was erroneous.¹³

It is fundamental that a real estate expert in making a valuation of property must consider all known factors and circumstances relative to the property. Although this expert knew of the government lease providing for a rental of \$389,000.00 a year and the government's right to renew the lease at a rental of \$417,000.00 a year for an additional period of 5 years after the required remodeling of the buildings, he admitted that he disregarded the lease as an element of value. He valued the property as though (1) no lease had been entered into with the government or (2) the owners were not able to effect the required remodeling although there was no testimony to this effect. Accordingly the Court's ruling violated established legal

¹³ Counsel for the owners made a similar motion to strike the testimony of government expert, Savage, who also disregarded the lease. (App. 142). Since in his rebuttal testimony Savage did take the lease into consideration, the owners would not seem to have any just complaint as to the denial of this motion.

principles as to the admissibility of opinion evidence of real estate experts.

In re Clearview Expressway, City of New York 9 N.Y. 2d 439, 174 N.E. 2d 522 (1961) the Court of Appeals of New York reversed a condemnation award because the government's real estate expert had not given full consideration to potential value. The owners were held entitled to the full value of their property based on the best use that could be made of it and the fact that they had not put the property to that use because of a temporary stringency in the money market or their own financial inability did not deprive them of the fair potential value of the property.

Appraisal evidence arrived at through the application of erroneous principles is unsubstantial as a matter of law, even though it may appear substantial on its face. 5 Nichols *Eminent Domain* Sec. 18.46 P. 290.

The valuation opinion of Throckmorton was properly subject to a motion to strike for a separate and independent reason, namely, because he had not valued the property in accordance with his own testimony as to its highest and best use. This motion was denied (App. 80). Throckmorton testified that he considered the highest and best use of the buildings on this property to be "a distribution building or a discount house" (App. 20, 55, 57). But he made no attempt to value the property on the basis of this claimed most profitable use (App. 79). On the contrary his valuation of \$1,140,000.00 was predicated upon the vacant buildings being warehouses and the vacant lot continuing as a parking lot (App. 54, 79, 80, 88, 96). He made no effort to value these properties for a retail discount store or a distribution building (App. 79). Throckmorton did not even know the rental value of the buildings if used

for a discount store although he had testified that this was the best use (App. 77, 79).

The Fifth Amendment guarantees just compensation and the Courts have interpreted just compensation to mean the full fair market value of the property taken for public use considering its most profitable potential use. An owner is entitled under the Constitution to have real estate experts for the government make their valuations in accordance with the constitutional concept. Since Throckmorton did not do this, there was a violation of a Fifth Amendment right of the owners.

VI

The District Court was in error in its pre-trial ruling forbidding the owners to submit evidence of sums actually expended on renovation of the property.

After the submission of briefs and argument, the District Court accepted the contention of the government that sums expended by the owners in connection with the remodeling of the property in conformity with the requirements of the lease to GSA were not admissible. Paragraph 7 of the Court's pre-trial order dated March 10, 1964, provided:

"The condemnees will not be permitted to introduce evidence of the amount actually expended on renovation of the property as an element of market value" (App. 10).

In its pre-trial opinion the District Court expressed the view that the better rule was to exclude testimony as to expenses for renovation of the building because "it would appear to be rare when the cost of the property plus the cost of improvements would be equivalent to fair market value" and expenditures made in reliance upon the lease

would be subject to recovery in a suit against the government on the contract (App. 9).

It is submitted that this ruling was erroneous. The Court had permitted the government to show the purchase price paid by the owners for the property. Since that cost was admitted as bearing upon value, cost should logically and sensibly be deemed to include not merely the original purchase price but in addition expenditures made by the owners in good faith to improve the property from its acquisition until the time of the taking. If this were not so, an owner would not be entitled to show the full cost to him of the property.

The leading authority on condemnation states:

"When it appears by independent evidence or by reasonable inference that a building or other improvement erected upon the land tended to adapt the property to the use to which it could most advantageously be put, and there is nothing to show that the sum paid for its construction was not paid in good faith and under normal conditions, it cannot be said as a matter of law that the cost would not assist the jury in arriving at the market value of the whole estate, and in such a case *evidence of the cost is admissible.*" 4 Nichols *Eminent Domain* (3rd ed.) Sec. 12.313 p. 138.

The test of admissibility is whether a prospective buyer would consider sums expended by the owner to convert the buildings to office use. *Cade v. United States*, 213 F.2d 138, 141 (4th Cir. 1954); *Clark v. United States*, 155 F.2d 157, 162 (8th Cir. 1946); *United States v. 443.6 Acres of Land*, 77 F. Supp. 84, 90 (D.C.N.D. 1948). Of course, a buyer would not only wish but would need this information.

In his pre-trial opinion the District Judge relied upon *Kinter v. United States*, 156 F.2d 5, 7 (3rd Cir. 1946) and *Foster, et al v. United States*, 145 F.2d 873 (8th Cir. 1944). They are distinguishable. In *Kinter* the sole issue was

whether the owner might state "as a lump sum" the total of all expenditures made by him over a period of years "for repairs and improvements" as bearing upon the question of fair market value. There the Court pointed out the conceded fact that cost is not synonymous with market value. In *Foster* the Court permitted the owner to testify that he had spent a great deal of money on improvements (p. 875).

When the government introduces, and emphasizes, the purchase price of a property as evidence of market value, as in the case at bar, it is completely illogical to exclude substantial expenditures for improvements made in good faith which necessarily increased the owners cost.

This ruling was particularly prejudicial because the Court instructed the jury "that ordinarily a sale of the same type property near in time in the open market is the best evidence of market value of the property if there are no changes in circumstances pertaining to the property" (App. 596).

On the last day of this long trial, the day before the case was submitted to the jury, the District Court *sua sponte* reversed its pre-trial ruling and stated that the Court was willing to let this testimony come in (App. 487, 489, 490). Counsel for the owners did not, or could not, put the evidence in at that late state of the trial. The record does not show whether this was because of the fact that, in reliance upon the pre-trial opinion and order, the material had not been prepared for submission.

It is submitted that, when a trial court makes a definitive formal pre-trial ruling, trial counsel are required to respect it and need not anticipate that it will be revoked near the end of the exhausting trial when trial counsel had to focus upon rebuttal evidence, argument on instructions and arguments to the jury.

VII

The District Court was in error in refusing to permit the owners to submit testimony in support of their motion for a new trial on the ground of newly discovered evidence and in denying the motion.

After the appeal of the property owners was filed in the District Court from the judgment in this condemnation case but before the record had been transmitted to the Court of Appeals, Appellants discovered highly significant new evidence and promptly filed in the District Court a Motion for a New Trial on the Ground of Newly Discovered Evidence, which, supported by affidavits (App. 604), showed:

Shortly after the taking of the property by the United States on January 18, 1963, the Government employed two experienced, well-qualified, outstanding real estate experts, William F. Harps and Arthur M. Fisher, to make careful, independent valuations of the property and to testify for the Government as to their values in this condemnation proceeding. Pursuant to this employment, Harps and Fisher made studies of the property and submitted to the Government their respective appraisals, which took into consideration all relevant and material factors, as they were required to do, including the executed non-cancellable lease of the buildings on the property to GSA. Their appraisals far exceeded the values submitted at the trial by Throckmorton and Savage on behalf of the Government.¹⁴

Upon receipt of these appraisals, a Government official directed Harps and Fisher to make new appraisals of the property upon a basis which would disregard the Government lease and the rental provided in it. Each expert complied with this directive and submitted to the Government

¹⁴ In their affidavits attached to the Motion, Mr. and Mrs. David Lawrence stated that, when they talked to Harps and Fisher they refused to show them their appraisals. However their statements to the Lawrences showed that the Harps and Fisher appraisals exceeded \$2,000,000.00.

new appraisals which again showed that the property had a fair market value at the time of taking far in excess of the values submitted at the condemnation hearing by the Government.

The Government then ignored the four separate appraisals of Harps and Fisher and employed second choice real estate experts Throckmorton and Savage, who appraised the property at \$1,140,000 and \$1,372,000, respectively, and the Government submitted their testimony to the Court and jury.

Although prior to the trial, counsel for the owners had attempted to obtain disclosure of the appraisals of all Government experts and the amounts thereof, Government counsel refused to exchange appraisals and solicited the pre-trial Order of the District Court prohibiting any discovery of appraisal reports.

The Owners and their counsel did not know before or during the condemnation hearings that Harps and Fisher had valued the property at amounts far in excess of the values submitted to the jury by the Government and that the Government had directed them to reappraise the property disregarding a material factor of value, namely; the Government lease. If counsel for the Owners had known that the appraisals of Harps and Fisher did not confirm those of Throckmorton and Savage, they would have called them to testify at the trial.

The Answer of the Government to the Motion (App. 615) did not deny the facts stated in the Motion but asserted that appraisals of experts constitute the work product of the lawyer and are not subject to discovery; that the District Court in its pre-trial Order, in recognition of this principle, had refused to allow discovery of the appraisal reports; that the Court did require an exchange of the names of appraisers to be called at the trial, which Order

was complied with by the Government; that it was the privilege of the Government and the property owners not to use at the trial any expert witness; that the Owners had availed themselves of this same privilege; and that counsel for the property Owners knew prior to trial that Messrs. Harps and Fisher had made appraisals for the Government.¹⁵

When the Motion was set for hearing, Appellants subpoenaed Messrs. Harps and Fisher and their reports; the Government filed a Motion to Quash the Subpoenas. At the hearing on the Motion, Harps and Fisher with their appraisal reports were present in Court prepared to testify involuntarily pursuant to the subpoenas and to produce their appraisals made for the Government (App. 623). The District Judge arbitrarily refused to permit their testimony to be taken or their appraisals to be submitted in evidence (App. 623) and denied the Motion for a New Trial on the Ground of Newly Discovered Evidence (App. 624).

The District Court had jurisdiction to entertain the Motion and jurisdiction was conceded in the Government's Answer to the Motion (App. 615). Rule 60(b) of Rules of Civil Procedure; *Smith v. Pollin*, 194 F.2d 349 (D.C. Cir.); *Greear v. Greear*, 288 F.2d 467 (9th Cir.); *Ryan v. U. S. Lines*, 303 F.2d 434 (2nd Cir.).

A condemnation proceeding is not an ordinary adversary civil action; it is *sui generis* and the rights of the citizens against whom it is invoked must be zealously guarded. *In re South Carolina Public Service Authority* (ED. So. Car. 1941) 37 F. Supp. 28, 30. It is so recognized in the Federal Civil Rules. When the United States exercises its sovereign power to take private property for public use, the Fifth Amendment imposes upon it an implied contract to pay the

¹⁵ At the hearing on the Motion this was conceded by counsel for Appellants.

Owners the fair value of their property. *United States v. Great Falls Mfg. Co.*, 122 U.S. 645 (1884); *Hollister v. Benedict*, 113 U.S. 59 (1885); *United States v. Lynal*, 188 U.S. 445 (1902).

In the analogous area of criminal cases, where a constitutional right is also involved, due process requires the Government to conform to a high standard of disclosure. *Pyle v. Kansas*, 317 U.S. 213 (1942); *Brady v. Maryland*, 373 U.S. 83 (1963); *Griffin v. United States*, (D.C. C.A. 183 F.2d 993 (1950)); *United States v. Lawrenson*, 298 F.2d 880 (4th Cir.), cert. denied 370 U.S. 947; *Curran v. Delaware*, 259 F.2d 707, 713 (3rd Cir. 1958). The failure of the Government to disclose the opinion of an expert has been deemed a violation of due process. *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964).

In the context of this case, it is submitted that the failure of the Government to disclose to counsel for the Owners the four separate appraisals made for the Government by Harps and Fisher constituted a violation of a Fifth Amendment right and due process. Since an eminent domain proceeding is not an ordinary adversary civil action, in which counsel are under no duty to make anything available to the other side, however beneficial, the Government should not be permitted to withhold from property owners important information in its possession establishing an entirely different value of property from that claimed by the Government at the hearing. Surely a report of an expert geologist employed by the United States, developing that there was a valuable ore or oil deposit under a farm, is a material fact and should not under the Fifth Amendment be withheld from the property owner in a condemnation proceeding.¹⁶

¹⁶ Compare 4 Nichols' *The Law of Eminent Domain*, § 12.231 (3rd ed., 1962); *Huie v. Campbell*, 121 NYS 2d 86 (1953); *Matter of Board of Water Supply in City of New York*, 205 NYS 237 (1924); *Tyson Creek R. Co. v. Empire Mill Co.*, 174 P. 1004 (Idaho 1918).

In valuing property in downtown Washington, it is impossible for judges, lawyers and laymen to deal with the complex issue of valuation without the testimony of real estate experts which is essential to the determination of fair value. In this area of general public ignorance, an expert's finding of value should be deemed a material fact because it constitutes the sole means for the fulfillment of the owner's Fifth Amendment guarantee of just compensation.

When the appraisals of the carefully culled second choice experts for the Government were almost \$1,000,000 less than the appraisals of the experts for the Owners, when the appraisals of the Government first choice experts were far in excess of those submitted by the Government to the jury, when they tended to confirm the values of the real estate experts for the Owners, when the disparity in values was shocking, it is submitted that the Government was under a duty to make the Harps and Fisher valuations available to counsel for the Owners, and to refrain from soliciting from the District Court a pre-trial order prohibiting the discovery of appraisal reports.

In *Barbee v. Warden*, 331 F.2d 842 (1964), the 4th Circuit held that the failure of the Government to disclose in a criminal case an opinion of an expert which was favorable to the defense was a violation of due process. There the Court treated the opinion of the expert as a material fact. There, as here, opposing counsel knew of his employment but assumed that his opinion was unfavorable to the defendant. Yet the Court deemed this fact immaterial by reason of the affirmative obligation of the Government to make the disclosure.

If the Fifth Amendment right to just compensation for private property taken for public use is meaningful, the Sovereign must be deemed subject to the same high obliga-

tion of disclosure. The Government, of course, has the absolute discretion to determine which of its experts will be used in a condemnation hearing on just compensation and it is not obligated to call to the witness stand any particular one. But this discretion does not mean that under the Fifth Amendment the United States can shop for real estate experts until it resurrects one who will place a low value on private property taken for public use *without the owners and the jury, the triers of the facts, knowing that it has done so*. Our Government can seek its experts where ever it can find them; it can cull them or reject them but it cannot deny to the jury its right of access to the facts; it cannot elicit from a judge a court order prohibiting a property owner from finding out the facts; it cannot hide its doings behind the wall of a court order prohibiting discovery.

In a civil tort action, where no Fifth Amendment right is involved, it is commonplace for a party to obtain discovery of reports of all medical experts of the other side and to call to the witness stand an expert who was not used by his employer because his opinion was unfavorable to it. In such a case the employer is protected by his right of cross-examination of the expert, i.e., to show that his opinion is based upon erroneous assumptions or methods. Yet here the Government induced the District Court in a Fifth Amendment taking case (1) by pre-trial order to prohibit any form of discovery of the valuations of its experts Harps and Fisher and (2) to deny the motion for a new trial without even permitting the Owners to establish the facts.

This was a "quick-take" under the District of Columbia Code (1961 ed.) Section 16-628 permitting the Government unilaterally to acquire immediate title and possession upon payment into court of the Government's "estimate of just compensation." If the newly discovered evidence indicated

that the Government paid into court far less than the estimate then in its files, there was at the outset of the proceeding a violation of due process and a Fifth Amendment right of the Owners.

In the context of this case, the newly discovered evidence confirmed the gross inadequacy of the jury award and required the District Court, in applying equitable principles, to grant the Owners a new trial. That evidence indicated that four real estate experts—two employed by the United States (Harps and Fisher) and two employed by the Owners (Kolb and Mack)—valued this property in amounts far in excess of the jury award and only two experts (Throckmorton and Savage) supported it. If the jury had known of the four separate appraisals of Harps and Fisher, made, not for the Owners, but for the Government, contradicting those which the Government used at the trial, it is impossible to believe that the jury would not have made a more adequate and just award.

Government experts, Throckmorton and Savage, testified on cross-examination that they were not instructed or requested by any one to disregard the Government lease (App. 81, 142). Accordingly the jury must have assumed this to be so and that their rejection of this important known undisputed fact in making their valuations was based upon their own independent judgments. If, as asserted in the Motion, the Government had earlier instructed Harps and Fisher to make new appraisals of the property disregarding the Government lease, the Government must have directed their second choice appraisers to do likewise. In this connection, Throckmorton did not even complete his appraisal report until February 27, 1964 (App. 55, 56), *after* Government counsel had taken the definitive position in Answers to Interrogatories dated January 2, 1964, that the Government lease of the buildings was irrelevant to their fair value. Accordingly, the newly discovered evidence estab-

lished that the testimony of Throckmorton and Savage as to this was untrue and, if it had been available to the jury, it would have undermined their credibility. At least the newly discovered evidence was of such significance that the jury was entitled to consider it in their determination of the credibility of the comparatively low valuations of Throckmorton and Savage.

Since the allegations of the Motion, supported by the affidavits of Mr. and Mrs. Lawrence, were not denied in the Answer of the Government, the District Court erroneously denied the Motion. If the Answer did not constitute an admission of the facts alleged, the Court's refusal to permit counsel for the Owners to submit the involuntary testimony of Harps and Fisher and their appraisal reports in support of the Motion constituted an arbitrary abuse of discretion.

CONCLUSION

The judgment should be reversed in order that a new trial may be had in accordance with instructions of the Court.

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BRIEF APPENDIX

United States v. Certain Parcels of Land, 15
F.R.D. 224 (S.D. Cal. 1954)

The Court concluded (p. 237):

"The potential evidentiary uses to which defendants might properly put information probably to be found in the documents sought by the pending motion and probably not available to defendants prior to trial if at all, otherwise than through discovery proceedings, provide sufficient "good cause" for an order at this time It seems clear and long has been recognized that discovery should provide a party access to anything that is evidence in his case."

United States v. Cors, 337 U.S. 325, 333 (1949)
and

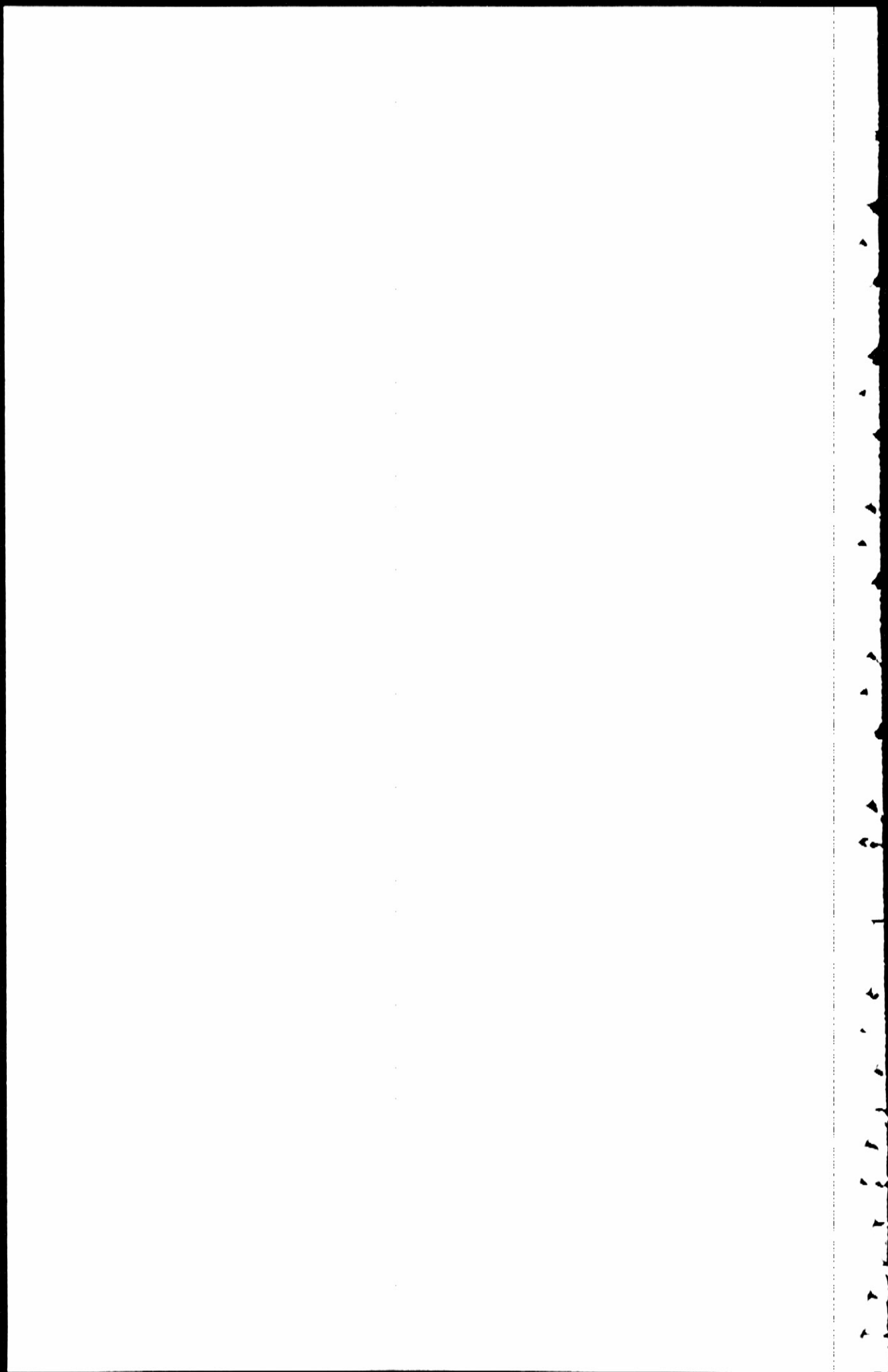
Carlstrom v. United States, 275 F.2d 820, 808
(9th Cir. 1960)

In *Cors* the United States requisitioned a tug in 1942, during the War. In the ensuing "just compensation" proceeding in the Court of Claims, that Court found that at the time of the requisition there existed in the Port of New York "a rising market and a strong demand for tugs of all types" due in part to the government's requisitioning program, i.e., to the government's need for vessels in the prosecution of the War. The Supreme Court (Frankfurter, Jackson & Butler dissenting) held that in time of war or other national emergency the demand of the government for an article or commodity caused the market to be an unfair indication of value; the special needs of the government creating a demand that outruns supply and the normal market price becomes inflated by the special need of the government. "That is a hold-up value, not a fair market value" which the government created and in

fairness it should not be required to pay (p. 333, 334). Since the Court of Claims had not made findings defining the precise extent of enhancement in value due to the government's necessity, the case was reversed.

In *Carlstrom* the government leased 30 Convair planes upon the outbreak of the Korean War. In a later condemnation of comparable planes it was held that evidence of the rental value payable by the government under the lease due to the government's necessity in a national emergency was not admissible.

It is submitted that *Cors* and *Carlstrom* have no application to this case. There was no national emergency, GSA wished additional office space, advertised for competitive bids and then entered into free negotiations with the property owners. There were other properties which GSA could have elected to utilize but it chose to lease the property later condemned. There was no evidence that the rental was excessive; the evidence showed that it was reasonable (App. 188 Kolb; 412 Mack; 323, 324 Hendrickson). Thus there was no coercion, no compulsion, no emergency and no necessity which forced GSA to lease these premises. Nor was this site the only available office space in downtown Washington. Thus the situation here bears no real relationship to the rule of *Cors* and *Carlstrom*.



BRIEF AND APPENDIX FOR THE UNITED STATES,
APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18918

ALBERT P. DICKER, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

No. 19036

CERTAIN LAND IN SQUARE 378 IN THE DISTRICT OF COLUMBIA,
ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

J. EDWARD WILLIAMS,
Acting Assistant Attorney General
ROGER P. MARQUIS,
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United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 12 1965

Nathan J. Paulson
CLERK

QUESTIONS PRESENTED

1. Whether, in a federal condemnation case, it is reversible error for the district court not to order discovery prior to trial of the expert real estate witness' appraisals.

2. Whether the appellants have been prejudiced by the various rulings of the district court on the admission and exclusion of evidence.

3. Whether the district court's order denying appellants' motion for a new trial on the grounds of newly discovered evidence was an abuse of discretion.

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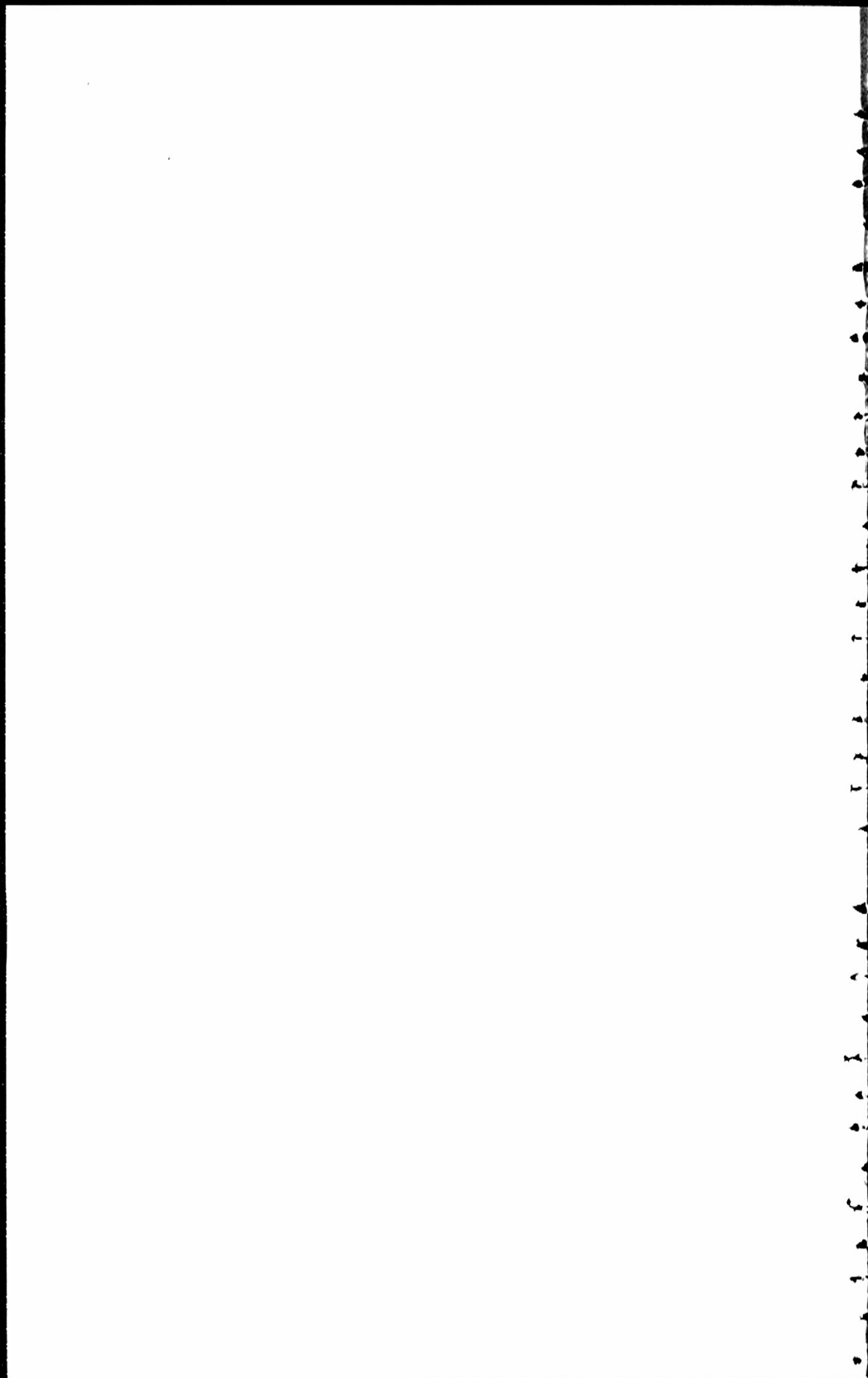
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18918

ALBERT P. DICKER, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

No. 19036

**CERTAIN LAND IN SQUARE 378 IN THE DISTRICT OF COLUMBIA,
ET AL., APPELLANTS**

v.

UNITED STATES OF AMERICA, APPELLEE

***APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA***

BRIEF AND APPENDIX FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The memorandum opinion of the district court after the pre-trial hearing is found at pages 1-9 of the Joint Appendix. The supplemental pre-trial order is found at J.A. 9-11.

JURISDICTION

These appeals are from the final judgment of the district court in this condemnation proceeding entered April 8, 1964, and from the order of October 19, 1964, denying appellants'

motion for a new trial on the ground of newly discovered evidence (J.A. 624). The notice of appeal from the final judgment was entered on July 2, 1964, after the district court had denied a prior motion for a new trial on June 9, 1964. The notice of appeal from the order of October 19, 1964, was filed on October 22, 1964.

The jurisdiction of the district court over this condemnation proceeding is based on the Act of March 1, 1929, 45 Stat. 1415, as amended, D.C. Code sec. 16-619. This Court has jurisdiction of all final decisions of the district court under 28 U.S.C. sec. 1291.

STATEMENT

This is an appeal by the landowners from the final judgment in a condemnation proceeding by the Government to acquire the property known as the Merchants Transfer and Storage Building at 918-922 E Street, N.W., in downtown Washington. The complaint and declaration of taking were filed on January 18, 1963, and estimated compensation was deposited in court. The purpose of the taking was for the construction of a new Federal Bureau of Investigation building. The property, which was severed into three separate parcels by a public alley, was improved by an eight-story warehouse building fronting on E Street, a smaller six-story warehouse facing on the alley to the rear, and two adjoining vacant parcels, one of which was used for a parking lot (J.A. 11-18; Tr. 77-86). The total land area of both buildings, parking lot and vacant lot was 35,134 square feet (J.A. 13; Tr. 80). Two of the three separate parcels had only alley frontage (J.A. 20; Tr. 91).

A pre-trial hearing was held in this case on February 26, 1964. The district court then issued its memorandum opinion of March 4, 1964, which contains in substance the following rules pertinent to this appeal:

(1) Prior to the condemnation, a lease agreement had been entered into between the Government and the landowners to convert the two warehouse buildings to office space to rent for a term beginning May 1963. The Government contended that such lease was not admissible in evidence. The court

ruled that it could be admitted to show highest and best use, provided it could be shown that the lease resulted from bids received on a competitive basis or that the Government paid a fair market rental and not an "enhanced price which its demand alone has created * * *."

(2) Landowners desired to offer into evidence a "commitment" by an insurance company to purchase and lease back the converted warehouse building. The court held this agreement could be received in evidence to show highest and best use if it could be shown that the agreement was a firm offer without prior knowledge of the government project¹ and that the price was fairly arrived at without coercion.

(3) The question was raised whether the cost of converting the buildings from warehouse to office space for purposes of the alleged government lease was admissible in evidence. The court was of the opinion that the better rule is to exclude the cost of potential improvements. The court further noted that, if the condemnation action by the Government amounted to a breach of this lease agreement and as a result thereof the amounts expended for renovation were lost, an action for the loss will lie on the contract. There would then be the possibility of double recovery if this is admitted as an element of fair market value in the condemnation proceeding (J.A. 3-9).

After a further hearing on March 6, 1964, the court entered an order on March 10, 1964, ruling on the remaining issues raised by the parties at pre-trial. In addition to the rulings referred to above and others of no importance on this appeal, the pre-trial order held (J.A. 11):

(9) The sale of the subject property to the defendant owners, recorded on March 12, 1962, is admissible as evidence of fair market value. The Court considers this sale which was ten months prior to the time of taking by the Government as sufficiently close to the time of taking to be an indicia of value.

(10) Counsel for the Government and counsel for the owners will exchange names of appraisers which each expects to call as witnesses. Appraisal reports will

¹ The F.B.I. building.

not be exchanged and no additional discovery pertaining to these expert witnesses will be allowed.

THE GOVERNMENT'S CASE

Trial before the district court, sitting with a five-man jury, as provided by statute, commenced on March 23, 1964, and concluded April 1, 1964. The Government first presented its evidence with the expert real estate appraiser, William Throckmorton, leading. After giving his qualifications, Mr. Throckmorton described the physical property (J.A. 11-18); Tr. 75-87). Mr. Throckmorton felt that the depth of this property, about 190 feet, with a comparatively small street frontage, tended to reduce the average square foot value. Buildings facing on streets tend to have higher rental values than those with exteriors on alleys (J.A. 19; Tr. 89). Mr. Throckmorton's opinion on highest and best use was that the warehouse is a proper improvement for this property (J.A. 20); Tr. 90). As for the frontage on E Street, he thought that "a loft-type building, or a building with one of the discount houses * * *" would be more suitable than the warehouse. In making this evaluation, Throckmorton went into all approved methods of appraising property, income, reproduction cost less depreciation plus land value and comparable sales or market data (J.A. 21; Tr. 92). In final analysis, his conclusions were arrived at from sales data.

The first sale that Mr. Throckmorton relied on was the sale of the identical property 10 months before the date of taking for \$1,000,000, or \$28.40 per square foot of land, including improvements (J.A. 22-23; Tr. 93-95). It was sold by Merchants Transfer and Storage Company to Dicker & Lawrence, Inc. Mr. Throckmorton then gave the details of 19 comparable sales of land and improvements in the downtown area (J.A. 23-47; Tr. 96-139). These sales were in the area bounded by 7th Street, H Street, 14th Street and D Street, N.W. These sales, with two exceptions, were in a range from \$12 to \$48 per square foot of land. The exceptions were the old Columbia Theater at 1110 F Street, which sold for \$54 per square foot, and the northwest corner of 12th and E Street, N.W., which sold for \$75 per square foot. In addition, Mr. Throckmorton

gave the price for three outlying warehouses (J.A. 29-34; Tr. 105-113). Mr. Throckmorton stated that he had about 20 more sales along 7th Street in the price range between \$16 and \$25 per square foot (J.A. 47; Tr. 139). After analysis, the witness stated "the sale of the subject property, itself, would take precedence in my mind over everything else * * *" (J.A. 48; Tr. 140).

Based on his analysis of all methods including sales, Mr. Throckmorton was of the opinion that the value of the property on the date of taking, January 1963, was \$1,140,000 (J.A. 48; Tr. 141). He summarized his valuation based on capitalization of income from the property for warehouse and parking lot uses (J.A. 49-51; Tr. 141-146). Value based on rental of the buildings as they exist was estimated to be \$1,036,500 (J.A. 51; Tr. 146). The comparable warehouse rentals used in the capitalization were given by the witness (J.A. 52; Tr. 147). Mr. Throckmorton also considered reproduction cost approach but did not give it any weight in his final valuation (J.A. 52; Tr. 148). Several sales of "alley lots" were listed in justification for the valuation of the vacant lot which fronts on the alley (J.A. 53-54; Tr. 148-150).

On cross-examination, the landowners moved that Mr. Throckmorton's testimony be stricken on the ground that "He has testified that its highest and best use was for some other use than he testified" (J.A. 80; Tr. 192). The motion was denied. Prior to this motion, the witness had testified that he had made no study of the rental value of retail discount stores or distribution buildings, but had valued the building as he found it (J.A. 79; Tr. 190). He thought such rental would be more than 50 cents a foot, but the exact amount depended on the type of building that might be placed there, or the remodeling of the present building (J.A. 79; Tr. 191).

On cross-examination, Mr. Throckmorton was questioned extensively about the Government's tentative leasing arrangement on part of the condemned property (J.A. 58-77; Tr. 156-187). In response to this cross-examination, Mr. Throckmorton testified that he was aware of a proposed lease on the

condemned property (J.A. 58; Tr. 156). He discussed some of the conditions preceding the lease (J.A. 58; Tr. 157). The witness had been furnished with a copy of the lease and had read it during his appraisal (J.A. 58; Tr. 157). The landowners were not permitted at this point to ask: "In light of the fact that there was an existing lease, can you still say that you did not consider this building appropriate for office use?" (J.A. 59; Tr. 157-158). The court ruled it was repetitive and argumentative.

Just prior to the question, this cross-examination had occurred (J.A. 57-58; Tr. 155-156):

Q. Did you, in your determination of what the highest and best use for this property is, exclude its use as an office building?

Mr. LIOTTA: I object. The witness testified to what he considered the highest.

The COURT: Overruled. The witness may answer.

The WITNESS: As I understand it, sir, did I consider it as an office building?

By Mr. YOCHELSON:

Q. Yes, sir.

A. I did not.

Q. Why not?

A. For several reasons, sir.

Q. What are they?

A. I don't think that the time is ripe yet for an office building in that particular location. I would not say that it is not possible to build one. But I would say that it would be a high risk rate on putting an office building up down there to fill it with individual tenants.

Mr. Throckmorton testified on the terms of the proposed leasing arrangement over the objection of the Government (J.A. 60; Tr. 160 *et seq.*). The lease called for \$3.74 per square foot, or \$388,999.92 per year gross rental (J.A. 60; Tr. 160-161). The lease itself was introduced in evidence as Defendants' Exhibit No. 1 over government objection and was read into the record (J.A. 61, 67-74; Tr. 162, 172-181). Mr. Throckmorton testified that he did not consider the present

buildings as being desirable as office buildings (J.A. 76; Tr. 184). The only connection between the building in front and the one in the alley was an overhead bridge, and individual tenants would not have considered renting space in an alley building (J.A. 76; Tr. 184). He knew plans had been prepared for remodeling the buildings. He did not remember whether he knew that a building permit had been issued, although this would not have made any difference (J.A. 77; Tr. 186).

The second real estate expert to testify for the Government was Mr. Robert Savage (J.A. 123). Mr. Savage used the standard three approaches to valuation: analysis of comparable sales, reproduction costs and capitalization (J.A. 125; Tr. 269). The most informative sale was the sale of the condemned property itself for \$1,000,000 on March 12, 1962 (J.A. 126; Tr. 270). He then gave several other comparable sales which were considered (J.A. 127-133; Tr. 271-280). Mr. Savage testified to several sales within approximately three blocks of the condemned property at prices ranging from \$9 to \$35 per square foot for land (J.A. 127-132; Tr. 271-278). He also mentioned the sale of property at 12th and E Streets, N.W., but did not find that in any manner comparable to the condemned property (J.A. 132; Tr. 278-279). Based on analysis of comparable sales, Mr. Savage valued the property at \$1,311,750 (J.A. 133; Tr. 280). This allowed approximately \$40 per square foot for the front property, and \$28 for the alley property including improvements (J.A. 133-134; Tr. 281). On the reproduction cost approach, he valued the property at \$1,373,779 (J.A. 137; Tr. 287). On capitalization of income, his valuation was \$1,211,173 (J.A. 139; Tr. 290). On consideration of all three approaches, his final appraisal was \$1,372,000 (J.A. 139; Tr. 291).

At the opening of the cross-examination, Mr. Savage was questioned extensively on the tentative government lease of the condemned property (J.A. 140-146; Tr. 292-302). Under this examination, the witness testified that the vacant buildings were subject to a lease "if and when it was renovated and remodeled" (J.A. 140; Tr. 293). Mr. Savage did not consider the highest and best use to be office building space because the

only likely prospect was the United States Government (J.A. 141; Tr. 293). However, he knew of and considered the government lease (J.A. 142; Tr. 295-296). There had been some start made at remodeling the building (J.A. 141; Tr. 294). The thing that stood out in his mind more than any other on this lease is that "at least one half of this proposed contingent office building was back in an alley, and I asked myself, 'Where in the City of Washington is there an office building in an alley?'" (J.A. 143; Tr. 296).

THE LANDOWNER'S CASE

The first witness for the landowners was the expert real estate appraiser, Mr. Stanton Kolb (J.A. 161). After preliminary statement of qualifications and description of the property, Mr. Kolb testified that "this immediate area was in the middle of a very strong office building boom" (J.A. 167; Tr. 341). In his opinion, the highest and best use of the property was as an office building site (J.A. 167; Tr. 342). He mentioned other warehouses that had been converted into office space over the Government's objection that they were not comparable (J.A. 171-172; Tr. 349-350). Mr. Kolb thought the present structures were sound for purposes of conversion (J.A. 172-174; Tr. 351-353). Mr. Kolb stated that he used the three standard approaches to valuation (J.A. 174; Tr. 353). He listed several comparable land sales and, based on these, a value of \$55 and \$60 per square foot for the land in the condemned property was made (J.A. 174-181; Tr. 354-366). The witness next testified to the reproduction cost less depreciation for the warehouse improvements as they existed on the date of taking (J.A. 182-184; Tr. 366-369). Including the land and the existing warehouses, Mr. Kolb found the condemned property to have a value of \$2,950,000.

Mr. Kolb testified that, although he knew of the government lease of the condemned property, that did not affect his determination of highest and best use (J.A. 185; Tr. 372-373). He reiterated that this highest and best use would be "in conversion of the structure from a warehouse building to an office building to be rented to individual tenants, or to a bulk tenant, a single-user tenant, one or the other" (J.A. 185; Tr. 372).

The witness was then asked about the rental income that could be received after the projected conversion into office space (J.A. 186; Tr. 373). The government objection to any evidence of the rental value of nonexistent improvements was overruled (J.A. 186-187; Tr. 373-376).

Mr. Kolb reviewed the terms of the government lease, including the gross rent of \$388,902 per year (J.A. 189-190; Tr. 379-381). After deducting various expenses, he arrived at a net income of \$275,000, and after deducting 6% return for the land, a net of \$203,000 return to the buildings (J.A. 191-192; Tr. 382-383). Capitalizing this income at 9%, the improved building would be worth \$2,260,000 and, after the cost of the land was added back in, \$4,257,000 for the property in its entirety (J.A. 192; Tr. 383-384).

Mr. Kolb then testified as follows (J.A. 192-193; Tr. 384-385):

Q. Mr. Kolb, what was your estimate or conclusion as to the cost of getting the building into this condition?

A. A total cost of remodeling the building would be \$1,673,000.

Q. So this leaves you a value, after the expenditure, of how much?

A. \$2,577,000.

Based upon all the land and the buildings in use converted to an office building, he was of the opinion the property had a fair market value of \$2,500,000 (J.A. 194; Tr. 386-387). At the close of Mr. Kolb's testimony, the Government made a motion to strike it on the ground that he had utilized the capitalization of hypothetical office buildings as an indicia of value, which was in violation of the court's pre-trial ruling. It was also based on the ground that the witness had ignored the best evidence of value, the sale of the property itself. The motion was denied (J.A. 260; Tr. 508-509). Cross-examination of Mr. Kolb was extensive, especially concerning whether Merchants Transfer and Storage Company was a well-informed seller (J.A. 198; Tr. 394).

The next witness for the landowners was Mr. Lloyd L. Hendrickson, assistant investment manager for Woodmen of the World Life Insurance Society, who testified about the sale and

lease back arrangement made on the condemned property (J.A. 262). Prior to the admission of Mr. Hendrickson's testimony in open court, he was examined extensively out of the presence of the jury (J.A. 262-294; Tr. 511-561). The Government objected to any testimony of the transaction or commitment made by Woodmen of the World to the property owners (J.A. 265-266; Tr. 517). At the close of Mr. Hendrickson's testimony out of the presence of the jury, the Government renewed its objections to the admissibility of the sale and lease back transaction (J.A. 290; Tr. 555). The objection was based on the grounds (1) that the transaction is being used to show value and not merely highest and best use in accordance with the pre-trial order, and (2) that the offer was not firm but was contingent upon a government lease, and upon a future appraisal after completion of the renovation (J.A. 290; Tr. 555-556). The district court ruled the testimony was admissible (J.A. 293; Tr. 561).

Testifying before the jury, Mr. Hendrickson first gave his background (J.A. 295-297; Tr. 562-566). He knew of "some proposal with respect to financing or purchasing" the Merchants Transfer property (J.A. 297; Tr. 566). He and others of his company had inspected the property and a formal submission was made to Woodmen in October 1962 (J.A. 299; Tr. 570-571). The request was for a "price" of \$2,800,000 with a leasing back to the owners for a 25 year period at a "rental" of 7.74% of the cost to be paid annually and three renewal options of 21 years each at the same rental figure (J.A. 300; Tr. 571-572).

When the witness was asked to enlighten the court and jury on "what a sale back lease arrangement is and how it compares with a conventional mortgage situation," the Government objected (J.A. 300; Tr. 572). The court then asked counsel property owners (J.A. 300; Tr. 572-573).

"You contend this was a sale?"

"Mr. BERNSTEIN: This was a sale-lease back, not a sale."

In making their evaluation of the property, Woodmen took into consideration that the government lease would pay either

\$388,000 or \$417,000 and that the payment to Woodmen under the sale and lease back would be \$216,000. Considering expenses of \$165,000, there would be an "excess" of \$66,000 for the lessee² (J.A. 304; Tr. 579). A copy of the commitment letter from Woodmen of the World was admitted in evidence over the Government's objection (J.A. 306-307; Tr. 583-584, 589).

On cross-examination, it was developed that the commitment was to pay "\$2 million 8 hundred thousand, or the appraised value, whichever is lesser" (J.A. 313; Tr. 593). The minutes of the company meeting at which the commitment was approved stated that the renovation was to be "at an estimated cost of \$1,800,000 * * *" (J.A. 314; Tr. 595). Mr. Hendrickson admitted it was possible that the appraisal could have been for \$2,000,000 or \$1,500,000 (J.A. 315; Tr. 596). The commitment was made subject to there being a government lease (J.A. 316; Tr. 598). The sale and lease back arrangement would net Woodmen 6% return on their money and complete amortization in 25 years (J.A. 319; Tr. 605). By Nebraska statutes, Woodmen was required to recapture its investment plus interest during the prime term of the lease back, which in this case was 25 years (J.A. 319, 324; Tr. 605, 613-614).

Mr. Joseph Venneri, a construction expert with experience in the field of general contracting, was called by the property owners as a witness (J.A. 371). His company, Arthur Venneri Company, had gone over the plans and specifications for the renovation of 920 E Street (J.A. 374-375; Tr. 711-712). They had estimated the cost of rehabilitating the building (J.A. 376; Tr. 714). Over the Government's objection, Mr. Venneri was allowed to give his opinion of what it would cost to renovate the building based on the plans and specifications (J.A. 377; Tr. 716-717³). That figure, according to Mr. Venneri, was \$1,380,000, and his company has submitted a written proposal to that effect (J.A. 377; Tr. 717-718). There were received in evidence Defendant's Exhibits Nos. 8,

² We are unable to ascertain where the obvious error in this computation occurs.

9 and 10 (J.A. 381; Tr. 724). These were the detailed plans and specifications for the renovation and the written construction bid based on them. Later, more plans for renovation and a later construction bid in writing were received in evidence (J.A. 388-390; Tr. 738-741).

The final witness for the property owners was Mr. Curt C. Mack, a real estate appraiser (J.A. 394). Mr. Mack was of the opinion that the highest and best use of the condemned property was to remodel it for offices for commercial purposes (J.A. 404; Tr. 768). Mr. Mack knew of the sale and lease back arrangement with Woodmen of the World and considered it significant (J.A. 418, 420-421; Tr. 790, 795-796). Mr. Mack relied on the capitalization of income method as significant (J.A. 422; Tr. 799). He considered the 7.74 percent rate of return and recapture of capital in the sale and leaseback transaction (J.A. 423-424; Tr. 800-801). He projected a \$56,000 cash throwoff for the lessee based on the government lease less expenses (J.A. 424; Tr. 801).

His first step in reaching a value by the capitalization method was to determine the value of the land (J.A. 427; Tr. 806). The total land value was \$988,774 (J.A. 427; Tr. 807). The next step was to convert "a respectable net income" into an opinion of capitalized value, "as if the property had been completed and according to the plans and specifications" (J.A. 429; Tr. 810). Based on "the commitment to lease to the United States Government" for \$388,000 per annum, Mr. Mack capitalized the income (J.A. 429 *et seq.*; Tr. 810-811 *et seq.*). After deducting estimated expenses, \$122,000, from the income from the government lease, the residual amount is \$266,000 (J.A. 433; Tr. 816).

Allowing a 6% yield for the land, \$61,000, the balance to be capitalized for the improvements is \$205,000 (J.A. 433-434; Tr. 817). This income was capitalized at 8¼% (J.A. 435; Tr. 820). The resulting value of the improvements is \$2,493,000 (J.A. 436; Tr. 821). Adding back in the value of the land, and then deducting the cost of renovation, \$1,350,000, the resulting value of the property under lease to the Government was \$2,155,000 (J.A. 437; Tr. 824). Mr. Mack then added in the value of the vacant parking lots which had not been in-

cluded in the above computation, \$807,000 (J.A. 438; Tr. 826). Mr. Mack's opinion of the fair market value for the entire property on the date of taking was \$2,962,000 (J.A. 439; Tr. 826-827). The court denied the Government's motion to strike Mr. Mack's testimony because it was based on the prospective government lease (J.A. 440; Tr. 829).

On rebuttal, the Government presented six witnesses, whose testimony will be summarized briefly. Mr. John D. Powell, a building manager for G.S.A., testified that he had returned to the Arthur Venneri Company certain window frames delivered in anticipation of the renovation of the Merchants Transfer warehouses (J.A. 499). Mr. Thornton Owen, a real estate appraiser, related the appraisal of the subject property for Merchants Transfer and Storage Company in the amount of one million dollars in connection with the sale (J.A. 502). Mr. George L. Scharf, a building contractor, gave the Government's rebuttal evidence on the cost of renovating the warehouses into office space, stating that it would cost either \$1,738,000 or \$1,601,000, depending on whether union labor was used (J.A. 514). Mr. John Newbold, the president of Merchants Transfer and Storage Company told of the sale of the E Street property to the present owners, and of the deliberations by his board of directors (J.A. 532). Mr. Wilford A. Mackey, a title insurance specialist, gave some details of a comparable sale at 933 D Street, N.W. (J.A. 536). The final witness in rebuttal was real estate appraiser Robert Savage, who capitalized the income from the government lease, and arrived at a net value, after deducting the cost of rehabilitation, of \$1,042,000 (J.A. 536).

The instructions to the jury, to the extent that they are pertinent to this appeal, are summarized in the Argument and are quoted extensively in the Appendix, *infra*. The jury found just compensation to be \$1,303,594 and returned an award in that amount. The final judgment on the verdict was entered on April 8, 1964. Appellants filed a motion for a new trial which was denied on June 9, 1964. A notice of appeal from the April 8 judgment was filed on July 2, 1964. This appeal is designated No. 18918. Thereafter on August 25, 1964, appellants filed another motion for a new trial on the

ground of newly discovered evidence, and a hearing was held on this subsequent motion on October 16, 1964. The motion was denied (J.A. 624). On October 22, 1964, a notice of appeal was entered from the order denying the motion for new trial on the ground of newly discovered evidence. The second appeal is designated No. 19036. Pursuant to the joint motion of the appellants and appellee, this Court, by its order of January 5, 1965, ordered the two cases consolidated for all purposes.

SUMMARY OF ARGUMENT

I

No reversible error was committed by the trial court in its ruling as to discovery of appraisal reports.

A. Even if erroneous, appellants have shown no prejudice justifying reversal of the judgment. Appellants requested at pre-trial a general stipulation that formal appraisal reports be exchanged without making any specific requests for interrogatories, depositions or production of documents. Appellants had the names of our experts in advance and had ample opportunity to cross-examine them at trial. Appellants have not shown how they were prejudiced by the ruling.

B. In any event, appraisals are not discoverable, as a general rule, in federal condemnation proceedings. The only appellate decision directly in point says that the trial court has a large measure of discretion on whether to allow discovery of a real estate expert's opinion. Fifteen district court opinions have been found dealing with discovery of real estate appraisers in federal eminent domain proceedings. Eight of the fifteen hold the expert need not submit to discovery. Five of the remaining seven allow discovery only as to limited factual matters. Only two have granted any broad right of discovery.

Among the reasons given for denying discovery of the real estate expert's appraisal are that it is merely opinion, that insofar as it involves facts they are equally available to appraisers for the other side, and that readily available data is not the proper subject of discovery. This refusal to allow discovery is also based on the "work product" rule announced by the Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1947), that the work done by a lawyer in preparing his case for trial is not

subject to discovery. This has been extended to include the work done by investigators or expert witnesses who are working directly with the lawyer in the preparation of his case.

It is also suggested that Rule 71A, F.R.Civ.P., was never intended to incorporate the federal rules on discovery to appraisals. The discovery rules were written for cases where the issue is posed by the pleadings and the sanctions for failure to cooperate are directed at the issues. There are no pleadings in the ordinary sense in condemnation cases; condemnees may present evidence as to just compensation at the hearing regardless of what action, if any, they may have taken theretofore; and, hence, the discovery process cannot be applied to the issue of just compensation in the same manner as it is to the issues in other civil cases.

II

The district court was correct in the various rulings on the evidence of which appellants complain. When the entire record is read, it will be seen that appellants got all their evidence before the jury and, if there was any prejudice, it was to the Government.

A. The Government's tentative lease of the condemned property after a future conversion should not have been admitted into evidence for any purpose. The district court's rulings allowing evidence of this lease were introduced over the Government's objection. At the time the case was submitted to the jury, it had no less than three complete capitalizations of income based upon this prospective government lease. Nonetheless, the appellants complain because the court changed the wording of their proposed instruction that this lease must be considered as being among the elements that affect "fair market value" to "highest and best use." Read in the context of the pertinent portions of the charge as set out in the Appendix to this brief, the court instructed that compensation and fair market value are based on and related to highest and best use. Thus, appellants were allowed to arrive at compensation based on capitalization of the income from this lease, and then the district court instructed that the jury could consider such evi-

dence in arriving at the highest and best use on which they were to determine fair market value and compensation.

Therefore, even if appellants were right about the law, they were allowed to present their evidence and there were no prejudicial instructions. If the Court agrees, it is unnecessary to consider what the law is. If the Court wants to consider the law, however, it is the Government's contention that all reference to the government lease should have been excluded from evidence under the rule that the Government's need for property is not to be considered in determining fair market value. Appellants should have been made to prove fair market value based on nongovernmental transactions.

Another relevant rule is that transactions involving a party with the power of condemnation are not free and open market transactions and, therefore, should not be considered in determining fair market value. Although an early District of Columbia case does not follow this, later opinions of this Court indicate a changed position.

B. The sale and lease back is not a comparable sale for purposes of establishing fair market value. Again, all the evidence of this transaction that could conceivably be pertinent was admitted in evidence before the jury. Nonetheless, the Government must insist that, under the correct law, no evidence of the sale and lease back transaction should have been presented to the jury. This type of arrangement is primarily in the nature of a financing agreement more akin to a mortgage or deed of trust than it is to a bargain and sale, and it does not indicate cash price on an outright sale.

C. The district court committed no error as to the testimony of government expert Throckmorton. The supervision of appellants' cross-examination of this witness was within the rule that the trial court may control its extent in the interest of a fair and orderly trial. The argument that Throckmorton's testimony should have been stricken because he capitalized the rental from the existing warehouse, rather than a nonexistent retail discount store, is not supported with any citation of authority that an appraiser must capitalize the income from a nonexistent building. Since his appraisal was based largely on

comparable sales, there is nothing more here than an argument as to the weight of the evidence.

D. Appellants were not prejudiced by the district court's ruling that amounts spent in initial steps of renovation are not proper elements of fair market value. The jury was given, by at least five different witnesses, estimates of the cost of the *entire* renovation of the building. It is difficult to see how appellants are prejudiced on this record, regardless of which statement of law one adopts. Moreover, miscellaneous expenditures of an owner are immaterial except as they affect fair market value. Therefore, the cost of drawing plans, knocking out partitions, etc., was properly excluded from this case, especially since the entire cost of the proposed renovations was shown.

III

Denial of appellants' motion for a new trial on the grounds of newly discovered evidence was not an abuse of discretion. The newly discovered "evidence" is that the Government had hired two appraisers, Harps and Fisher, whose appraisals were substantially higher than those of Throckmorton and Savage, who testified for the Government at the trial. Appellants knew prior to the trial that Harps and Fisher made appraisals, but apparently did not know the amount. Whether to grant or deny a motion for a new trial on the ground of newly discovered evidence is addressed to the discretion of the trial court, which will not be overruled except upon a showing of abuse. Appellants do not show how such appraisals would have been of value to them. They could not have been used to impeach the Government's appraisers. It is not incumbent on the Government to produce all appraisals, any more than it was on appellants, who did not produce all their appraisals. The government attorney has the obligation to prove his case in accordance with law, and must be given complete discretion within the legal framework as to which witnesses he will call. Further, appellants were not diligent in acquiring this "newly discovered" evidence, as it was equally as available to them before the trial as after.

ARGUMENT

I

No reversible error was committed by the trial court in its ruling as to discovery of appraisal reports

A. *Even if erroneous, appellants have shown no prejudice justifying reversal of the judgment.*—Appellants' pre-trial statement requested several stipulations including the following (J.A. 1):

(5) That formal appraisal reports of the expert appraisers engaged and who may be used at the trial, by the owners and by the United States of America be exchanged within ten (10) days hereof.

Pursuant to this requested stipulation and further discussion of the matter at the pre-trial conference, the district court entered the following order on March 11, 1964 (J.A. 11):

10. Counsel for the Government and counsel for the owners will exchange names of the appraisers which each expects to call as witnesses. Appraisal reports will not be exchanged and no additional discovery pertaining to these expert witnesses will be allowed.

Appellants claim this order was error and that they were prejudiced thereby. Inasmuch as appellants never, so far as the record shows, requested the taking of a deposition nor served interrogatories nor made a specific request for the production of documents, there is no specific issue as to any of appellants' rights under Rules 26-37, F.R. Civ. P., before this Court for decision.³ Appellants are in fact asking this Court for an advisory opinion on the broad general question of whether appraisals by paid real estate experts are discoverable prior to trial in federal eminent domain cases.

³ It must further be pointed out that the order of the district court is limited to experts which each expects to call as witnesses." Therefore it would presumably not apply to experts who were not called. In this regard see Point III of this brief. The Government most candidly states that it does not believe the appraisal of any expert is discoverable as a general rule, but the salient point is that this district court order does not so hold as to appraisers not to be called.

Appellants had the names of the experts who did testify. They had ample opportunity at this rather lengthy trial to cross-examine those experts. They make no showing of why that opportunity of cross-examination is not sufficient to discredit those witnesses' testimony if possible. To the extent that the appraisal reports might contain matter not presented to the jury, they are irrelevant. It is clear, we submit that appellants were not prejudiced by the ruling.

B. *Expert appraisal reports are not discoverable in federal condemnation proceedings.*—In *Jayson v. United States*, 294 F. 2d 808, 811 (C.A. 5, 1961), it was held that the "trial court is granted a large measure of discretion" in deciding whether to allow discovery of, among other things, a real estate expert's opinion, and further held there was no abuse of discretion in that case. *Jayson* is the only appellate opinion directly in point we have found.*

There is a plethora of district court opinion in the general area of discovery of expert witnesses. We shall not attempt to write a law review article in the general field, as this has already been done at least three times in the past three years. Goldstein, *The Discovery Process in Highway Land Acquisition* (1964) 33 Public Roads 21; Friedenthal, *Discovery and Use of an Adverse Party's Expert Information* (1962) 14 Stanford L. Rev. 455; 4 Moore's *Federal Practice* (2d ed. 1963) sec. 26.24: *Discovery from Adverse Party's Experts*.

Instead, we shall confine ourselves to those district court authorities directly in point, viz., those cases dealing with discovery of expert real estate appraisers in federal condemnation actions. Fifteen such opinions have been found. Eight of the fifteen decisions hold that the real estate expert need not answer any of the questions or interrogatories or produce the documents objected to. *District of Columbia v. All of Lot 803 (Trustees of Keshet Israel Congregation of Georgetown)*, unpublished, D.C. No. 1-62 (Sept. 25, 1962), reproduced in the Appendix hereto; *United States v. 4.724 Acres (Plaquemines Parish, La.)*, 31 F.R.D. 290 (E.D. La. 1962); *United States v. 900.57 Acres, Johnson & Logan Counties, Ark.*,

*There, as here, the court had ordered exchange of the names of the proposed experts but no more.

30 F.R.D. 512 (W.D. Ark. 1962); *United States v. Certain Parcels (San Francisco, Calif.)*, 25 F.R.D. 192 (N.D. Cal. 1959); *United States v. Certain Acres of Land (Decatur and Seminole Counties, Ga.)*, 18 F.R.D. 98 (M.D. Ga. 1955); *United States v. 7,534.04 Acres (Bartow and Cherokee Counties, Ga.)*, 18 F.R.D. 146 (N.D. Ga. 1954); *United States ex rel. T.V.A. v. Bennett*, 14 F.R.D. 166 (E.D. Tenn. 1953); *Hickey v. United States*, 18 F.R.D. 88 (E.D. Pa. 1952).

Of the remaining seven, five of the decisions allow discovery only as to limited factual matters. *United States v. 284,392 Sq. Ft. of Floor Space (Brooklyn, N.Y.)*, 203 F. Supp. 75 (E.D. N.Y. 1962) (notices general rule that opinions contained in appraisals are not subject to discovery, and limits it to facts upon which opinions and conclusions are based); *United States v. 19,897 Acres (Islip, Suffolk Co., N.Y.)*, 27 F.R.D. 420 (E.D. N.Y. 1961) (allowing discovery as to comparable sales and denying it as to all else); *United States v. 62.50 Acres (Lake County, Ohio)*, 23 F.R.D. 287 (N.D. Ohio 1959) (allowing discovery only as to document furnished by Government to appraiser); *United States v. 6.82 Acres (Bernalillo County, N. Mex.)*, 18 F.R.D. 195 (D. N. Mex. 1955) (Government did not object to disclosure of physical facts acquired by its employees, and its objection to discovery of opinions and mental processes of its appraisers upheld); *United States v. Certain Parcels of Land*, 15 F.R.D. 224 (S.D. Cal. 1953) (discovery of appraisal reports refused, but discovery of factual background material allowed).

In only two of the fifteen cases have there been granted any general right of discovery of expert real estate appraisers. In *United States v. 23.76 Acres (Anne Arundel County, Md.)*, 32 F.R.D. 593 (D. Md. 1963), the court indicated it would allow broad questioning of expert appraisers, but even there the questions propounded show some limitation on the scope of discovery of the complete appraisal report.⁵ Even in the only case found where the entire appraisal report was ordered to be produced, there was a condition that the party making the discov-

⁵ This case may have been influenced by the fact that Maryland is one of the three states which provide for discovery in condemnation cases. Hill, Farrer and Burrill, Attorneys at Law, *A Study Relating to Pretrial Conferences and Discovery in Eminent Domain Proceedings* (1964), 1 Mod. Proc. Commentator 465, 484.

ery must pay an equitable portion of the expert's fee. *United States v. 50.34 Acres (Nassau County, N.Y.)*, 13 F.R.D. 19 (E.D.N.Y. 1952). Therefore, only one of the fifteen cases in point would have supported appellants' attempt to discover the entire appraisal reports of the Government's experts prior to trial.⁶ We submit that the district court was clearly correct and in accord with the great weight of authority in refusing to permit discovery of the Government's expert appraisers.

The reasons for not allowing discovery of a real estate expert's appraisal are many. Insofar as the expert is merely expressing his own opinion, it comes under the general limitation that pre-trial discovery of opinionative material is allowed only for the most compelling reasons. *United States v. Certain Parcels (San Francisco, Calif.)*, *supra*. Insofar as the expert's appraisal consists of factual material, such as the physical attributes of the property or comparable sales, it is material that is equally available to the appraisers of the opposing party. Should a situation arise where one party could not make a satisfactory examination of the property, discovery might be appropriate. But even in that circumstance, there is little likelihood that the expert appraiser would be the sole witness with such knowledge, and probably would not even be the best witness to give such testimony. Commonly known and readily available data is not the proper subject of discovery. *United States v. Certain Parcels (San Francisco, Calif.)*, *supra*.

The lack of need for discovery in the case of the real estate expert is emphasized by the fact that he can rely on hearsay matters in expressing his opinion. *United States v. Featherston*, 325 F. 2d 539 (C.A. 10, 1963); *District of Columbia Redev. L. A. v. 61 Parcels of Land*, 98 U.S. App. D.C. 367, 235 F. 2d 864 (C.A. D.C. 1956).

Since the expert witness is usually engaged by the attorney with the view of preparing a case for litigation, it is also said that discovery of the expert's appraisal would violate the "work product" rule announced in such cases as *Hickman v. Taylor*,

⁶ Appellants also cite in their brief *United States v. 1278.83 Acres (Mecklenburg Co., Va.)*, 12 F.R.D. 320 (E.D. Va. 1952), as a case permitting discovery. However the questions there do not concern a real estate expert's appraisal, but are rather facts about the necessity and authority for the taking.

329 U.S. 495 (1947), and *Alltmont v. United States*, 177 F. 2d 971 (C.A. 3, 1950). The doctrine is stated in *Hickman v. Taylor*, 329 U.S. at pp. 510-511 as follows:

Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this as the “work product of the lawyer.” Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

In *Alltmont v. United States*, 177 F. 2d at p. 976, the doctrine is extended as follows:

While the language of the Supreme Court was here necessarily directed to statements obtained personally by Fortenbaugh as counsel for the adverse party, * * * we think that its rationale has a much broader sweep and applies to all statements of prospective witnesses which a party has obtained for his trial counsel's use.

Whatever the legal theory, however, the actual rulings of the district courts have been overwhelmingly in agreement with the ruling of the district court in this case. The practical considerations of a condemnation case leads necessarily to this result. All the legal issues in a condemnation case are not known at the time the appraiser is hired. In many instances the appraisal reports themselves will be the first thing to point up a particular legal problem. It is well known that many times early appraisals are unsatisfactory, frequently having been made on the wrong legal assumptions. Nor is it any secret that counsel frequently does not know until shortly before trial which of several experts he may use as witnesses. The issue of value is subject to more tangential questions than most lawsuits. To introduce yet another by allowing the parties to examine every appraisal report and mental process of the real estate expert, prior to trial, is to invite a complex issue to become chaotic.

These considerations suggest the question whether Rule 71A, F.R. Civ. P., was ever intended to incorporate the federal rules as to discovery by interrogations, admissions, production of documents or depositions with regard to appraisals. The discovery rules were written in the background of an issue being posed by the pleadings filed, and many of the sanctions for failure to discover are directed at the issues framed. For example, the first sanction mentioned in Rule 37(2)(i) is that the fact shall be taken as established "in accordance with the claims of the party obtaining the order," and (ii) permits an order refusing to allow the party to support or oppose claims or defenses, while (iii) permits striking of pleadings, dismissal of the action, or default judgment. None of these can apply to federal condemnation in regard to the just compensation issue because Rule 71A provides only that pleadings shall be filed as to right to take. A condemnee, "whether or not he has previously appeared or answered," may at the trial of the issue of just compensation "present evidence as to the amount of the compensation to be paid for his property." Rule 71A(e).⁷

⁷ Other federal rules apply to condemnation when it is not "otherwise provided in this rule." Rule 71A(a). Hence, it would be hard to read the discovery rules as impliedly amending Rule 71A(e). On the contrary, in the case of conflict Rule 71A provisions control.

This rule clearly does not contemplate application of the discovery process as to the issue of just compensation in the same manner as in other civil cases.

We submit that on all of these considerations discovery of reports rendered by expert appraisers as to their opinions and the reasons therefor is not warranted.

II

The district court was correct in the various rulings on the evidence of which appellants complain

The appellants complain about various rulings of the district court with regard to the admission, limitation or exclusion of evidence. When the entire record is read, it will be seen that the appellants got before the jury all evidence which could conceivably be admissible. Indeed, if any error was committed in the admission or exclusion of evidence, it was the Government, rather than the appellants, that was prejudiced. We now examine the specifications of which appellants complain.

A. *The Government's tentative lease of the condemned property after a future conversion should not have been admitted into evidence for any purpose.*—In this case, G.S.A.'s Office of Space Management entered into an agreement for conversion of the two warehouses on the condemned property to office space to be leased to the Government. Over the objections of the Government, the district court ruled (J.A. 5):

It must also be pointed out that this lease was entered into for a building not yet in existence and which was not completed at the time of taking on January 18, 1963. The issue for the jury is the fair market value as of the date of taking. The lease agreement for the building on the property [in] question if admissible under the conditions set forth below, will be received to show the highest and best use of the subject property.

The two conditions were (1) that bids for rental space were solicited competitively, and (2) that the Government paid a fair market rental not enhanced by its demand alone.

The wording of the pre-trial ruling shows that the district court was concerned that the jury might treat the income from the prospective government lease as if it were already being earned by the unconverted warehouses. Therefore, the court ruled that the government lease could not be used to prove fair market value, but only to show highest and best use. It was the Government's contention that it should not have been used at all. However, if it was to be used, clearly it should not have been used for any more than to show that there was potentially a demand for office space in the area at approximately the rates in the prospective government lease, i.e., to show highest and best use.

When the testimony about the prospective government lease came up before the jury, the district court, over the protests of the Government, allowed the landowners' witnesses to capitalize the income from the government lease and, after deducting the cost of the proposed conversion, to base fair market value on that capitalization process (see Statement, *supra*, pp. 9, 12-13, summarizing this testimony). The district court refused to strike the testimony of the landowners' witness Mack, although his testimony was based almost entirely on the capitalization of the prospective lease (J.A. 440; Tr. 829). Because the court admitted this testimony, the Government was forced in rebuttal to bring in its own witness to capitalize the income from this lease (J.A. 537-539).

Thus, at the time the case was submitted to it, the jury had before it no less than three complete capitalizations of the income from this prospective government lease. Nonetheless, appellants complain because the following requested instruction was not given (J.A. 559; Tr. 1064-1065):

You must consider all elements that might affect the fair market value of the property including the lease to the United States, the sale-leaseback to the Woodmen of the World, and all other elements as might influence a reasonably prudent person interested in purchasing the property.

The court stated it would give the instruction, but would change the words "fair market value" to "highest and best use" (J.A. 562; Tr. 1067).

An instruction cannot, of course, be considered in isolation, but the entire charge to the jury must be read together. It is submitted that the entire charge is extremely fair to the appellants, and from the Government's point of view goes much farther than was required by law. For the convenience of the Court, we reproduce in the Appendix hereto the pertinent portions of the charge with reference to the prospective lease and the capitalization of income from it (J.A. 594-596, 600-602; Tr. 1166-1169; 1177-1181). The charge there reproduced shows clearly that compensation and fair market value are to be based on, and related to, highest and best use. This concept is reiterated several times in the charge.

The appellants have been allowed to present all the evidence they could conceivably desire on this issue, and it is submitted that the charge to the jury, considered as a whole, is not prejudicial to them. To the contrary, the district court made it clear that the jury could consider this evidence in making its determination of just compensation. Appellants, therefore, cannot complain that the proposed government lease was not before the jury to be considered in determining just compensation.

Therefore, even considering, *arguendo*, that the rule of law is as appellants contend, and that they are entitled to have the prospective government lease considered by the jury in determining just compensation, there have been no rulings on evidence or instructions prejudicial to appellants. If the Court agrees with this argument, it is, of course, unnecessary for it to consider what the law is. Should the Court want to consider the correct rule of law, however, it is the Government's contention that all reference to the government lease whatsoever should have been excluded from evidence. This exclusion should have been based on the rule that the Government's need for property is not to be considered in determining fair market value. *United States v. Cors*, 337 U.S. 325, 332-334 (1949); *Carlstrom v. United States*, 275 F. 2d 802, 808-809 (C.A. 9, 1960); *Westchester County Park Commission v. United States*, 143 F. 2d 688, 693 (C.A. 2, 1944), cert. den., 323 U.S. 726. *Carlstrom* and *Westchester County* are identical holdings that the obligation of the United States upon taking fee title is not

measured by reference to a prior government lease of the same property.

If appellants wanted to show rental value in the area of this building based on private leases, there was no impediment, provided the properties were comparable and the demand for private office space was shown. However, the circumstances of this case were such as to strongly suggest that the only tenant for a converted warehouse, a large part of which had only alley frontage, was the Government. Therefore, the only satisfactory way to show that the government needs for this property had been excluded was to exclude the Government's prospective lease, and let appellants prove their fair market value based on nongovernmental transactions.

The above rule is different from another relevant rule discussed in appellants' brief, viz., that transactions involving a party with the power of condemnation are not free and open market transactions, but are more in the nature of compromise settlements, and therefore should not be considered in determining fair market value. *Evans v. United States*, 326 F. 2d 827, 831 (C.A. 8, 1964), and cases cited.

An earlier decision in the District of Columbia left some doubt as to whether this Court was following the majority rule. *Washington Home for Incurables v. Hazen*, 63 App. D.C. 185, 70 F. 2d 847 (C.A.D.C. 1934). A judgment was reversed in that case because the trial court had excluded earlier sales to the United States and the District of Columbia. However, in *Hannan v. United States*, 76 U.S. App. D.C. 118, 131 F. 2d 441 (C.A.D.C. 1942), this Court refused to reverse a trial court which had excluded an earlier sale to the United States. It did so because the person offering the evidence did not establish as a preliminary fact that the purchase was made "without compulsion, coercion or compromise." 131 F. 2d at p. 442. In discussing the quoted language in *District of Columbia Redev. L.A. v. 61 Parcels of Land*, 98 U.S. App. D.C. 367, 368, 235 F. 2d 864, 865-866 (C.A.D.C. 1956), this Court said:

A comparable sale was not under compulsion, coercion, or compromise in this sense, if the witness testifies, or if it is otherwise shown, that the public records do not dis-

close that the sale was at foreclosure, under deed of trust securing an indebtedness, at execution or attachment, at auction, *under pressure of the exercise of the power of eminent domain*, or other coercion *sui generis*—types of legal compulsion generally disclosed by public records. [Emphasis supplied.]

Thus, it is logical to assume that this Court would regard the sale or lease of property to one having the power of eminent domain as being "under pressure of the exercise of the power of eminent domain." In any event, the principal ground of the Government's contention is that value created chiefly by the Government's own needs should be excluded from fair market value.

B. *The sale and lease back is not a comparable sale for purposes of establishing fair market value.*—In its pre-trial order, the district court made the following ruling on the sale and lease back (J.A. 10):

5. The commitment between the condemnees and the Woodmen of the World, entered into on November 8, 1962, will be admissible to show the highest and best use of the property, provided that the owners can show that the agreement constituted a firm offer without prior knowledge by either party of the proposed project; and that the price was arrived at fairly and without coercion; and that a representative of the offeror is present and available for cross-examination.

Over the objections of the Government, Mr. Lloyd L. Hendrickson, an officer of Woodmen of the World, was allowed to testify about the sale and lease back arrangement. This testimony is set out at length in the Statement, *supra*, pp. 9-11, and will not be repeated here. However, it should be reiterated that counsel for the appellants, when asked by the trial court whether he contended this was a sale, replied: "This was a sale-lease back, not a sale" (Statement, *supra*, p. 10). This would indicate at the very least that appellants' counsel was recognizing the distinction between the two things. The requested instruction to the jury on the sale and lease back transaction is included in the instruction on the proposed government

lease and has already been discussed, *supra*, pp. 24-28. We have already pointed out that the court's instruction, considered as a whole, tied the concept of "highest and best use" directly into the amount of compensation to be paid to the owner. Since all the details of the sale and lease back were given to the jury by Mr. Hendrickson, there was no bar to the jury using these to determine compensation, and hence no prejudice to the appellants.

However, as in the case of the proposed government lease, the Government must insist that, under the correct rule of law, none of the testimony relating to this sale and lease back should have been presented to the jury. So far as we are aware, this is a case of first impression on whether a sale and lease back arrangement can be considered as a comparable sale in a condemnation proceeding. Leaving aside several objections of a preliminary nature,⁸ we move directly to what we consider to be the greatest objection to this type of arrangement as a comparable sale, viz., that it is primarily in the nature of a financing agreement more akin to a mortgage or deed of trust than it is to a bargain and sale. The terms of the particular sale and lease back here are that the "purchaser" will get his money back within the primary term of the lease with 6% interest on the capital invested. In other words, the "seller" guarantees the "purchaser" that he will get his investment back with interest. Obviously this type of financing device is open to all sorts of manipulations that a conventional sale is not. The amount of the "sale price" can be raised or lowered considerably by changing the amount of "rental" guaranteed in the lease.

The sale and lease back arrangement is in reality a sophisticated device for controlling the equity in real estate through options to renew equal to or longer than the estimated useful economic life of the building at fixed rentals, and controlling such equity with little or no investment of capital. We do not suggest that there is anything inherently wrong with this type

⁸ The consideration was for a building yet to be reconstructed. There had to be a completed five-year lease with the Government. The building price could not exceed the value appraised by a qualified appraiser. Thus, the commitment at the time of condemnation was not firm either as to price or in its entirety.

of financing arrangement, any more than there is anything inherently wrong with placing second, third, or fourth trusts on real property. See *Riley v. District of Columbia Redev. L.A.*, 100 U.S. App. D.C. 360, 246 F. 2d 641 (C.A.D.C. 1957). Although at first blush it would appear that here the cash involved represented a cash price for the property, that is not so because the purchaser is buying the long-term guaranteed rental income as much as he is buying real estate. Further, the estate transferred is not the same as the estate condemned. The estate condemned is the unencumbered fee simple. The estate transferred in the sale and lease back arrangement is the fee simple, subject to a long-term leasehold with options to renew at fixed rentals. In other words, the price of the sale and lease back cannot be assumed to equal the price of an outright sale, free and unencumbered of any remaining rights.

C. *The district court committed no error as to the testimony of government expert Throckmorton.*—Appellants make two arguments with respect to the testimony of the expert appraiser Throckmorton: first, they contend that the district court improperly restricted the cross-examination of this witness. Supervision of cross-examination and its curtailment, when overextensive, is within the discretion granted the trial court in condemnation cases. *Carlstrom v. United States*, 275 F. 2d 802, 808 (C.A. 9, 1960). As this Court said in *Wright v. United States*, 87 U.S. App. D.C. 67, 183 F. 2d 821, 822 (1950):

While cross-examination is a matter of right, * * * its extent can and must be reasonably controlled by the court in the interest of a fair and orderly trial. "In respect of such things as needless protraction, conduct of an examination in a manner unfair to a witness, undue inquiry into collateral matters to test credibility, and the like, cross-examination is properly within the discretion of the trial judge, and there can be no reversal except for abuse."

All the rulings of which appellants complain fit within the rule announced above on the discretion of the trial court to limit cross-examination. All of the rulings attacked go to details of his valuation, not to any basic legal principle of valuation. We have detailed the principal complaints in the

Statement, *supra*, pp. 4-7. Thus, appellants' complaint that they were not permitted to examine Throckmorton on his reasons for disregarding the government lease becomes, on examination of the entire record, repetitive and argumentative (J.A. 57; Tr. 155 *et seq.*). Some of the questions are merely insulting, such as the suggestion on cross-examination that the witness would have considered the government lease if it had been at a low rental rate, but not when there was a high rental (J.A. 97; Tr. 220). Others concerned matters such as aspects of the government lease, or frustration of plans to convert the building, which had not been opened on direct examination and were not properly before the jury (J.A. 60, 74; Tr. 160, 182). Some questions were objectionable characterizations of what the witness had testified (J.A. 98; Tr. 221). Some of the questions were purely argumentative (J.A. 76; Tr. 185). The question of whether the cost to the owners was greater at the date of taking than the date of their acquisition is simply immaterial (J.A. 114; Tr. 249). *Olson v. United States*, 292 U.S. 246, 255 (1934).

Appellants also argue that the district court should have stricken Throckmorton's testimony. The ground given to the trial court was that "He has testified that its highest and best use was for some other use than he testified" (J.A. 80; Tr. 192). In the context in which the motion was made, appellants' objection would appear to be that Mr. Throckmorton testified that the highest and best use for the property fronting on E Street was for a retail discount store or a distribution building, while on cross-examination he testified that he had not determined what the rental return would be for these purposes (J.A. 79; Tr. 190). Appellants now argue as if it were made because Mr. Throckmorton ignored the government lease. Assuming this argument raised for the first time on appeal is before the Court, the Government contends for the reasons set out, *supra*, pp. 24-28, that the appraisal of this property was properly made without reference to the government lease.

Returning to the only point legitimately raised by the motion to strike, it is largely a semantic quibble. Mr. Throckmorton relied more on comparable sales than on capitalization of in-

come. The use of this property as a retail discount outlet would have involved substantial reconstruction or a new building. Therefore, he capitalized the rental from the buildings as he found them, i.e., as warehouses. Since value for the highest and best use was already reflected in the comparable sales, and his valuation based thereon, there is nothing unfair in not investigating this use on the capitalization approach. In any event, we know of no case, and appellants cite none, that holds that an appraiser must capitalize the income from a nonexistent building. Moreover, any contradiction in his testimony goes merely to its weight, is matter for argument to the jury, and cannot be the basis for striking one or the other part of it.

D. *Appellants were not prejudiced by the district court's ruling that amounts spent in initial steps of renovation are not a proper element of fair market value.*—In their brief, appellants complain of the italicized portion of the pre-trial order, paragraph 7, which in full reads as follows (J.A. 10-11):

7. *The condemnees will not be permitted to introduce evidence of the amount actually expended on renovation of the property as an element of market value.* If the lease agreement between the parties is admitted into evidence, the Court will receive evidence of the building to be completed as required by the lease agreement as the highest and best use of the land.

Of course, the lease was received into evidence and the jury was given, by at least five different witnesses, estimates of the cost of the *entire* renovation of the building (J.A. 192, 314, 377, 437, 521; Tr. 384-385, 595, 717-718, 824, 981). It is difficult to see how appellants are prejudiced on this record, regardless of which rule of law one adopts.

The law involved in the admissibility of improvements or repairs is generally stated in two Third Circuit cases, among others. *Hickey v. United States*, 208 F. 2d 269 (C.A. 3, 1953), cert. den., 347 U.S. 919; *Kinter v. United States*, 156 F. 2d 5 (C.A. 3, 1946). These cases show that we are not concerned with the owner's investment in property but with fair market value, which may be either more or less than the investment.

The mere fact that the owner has expended some money for renovation since purchasing the property is, of itself, immaterial. Of course, if the property has been improved in such a way as to enhance its fair market value, it is proper to show this. Or if the property has been changed sufficiently, it might bear on the question of whether the last prior sale is truly comparable, i.e., whether it is still the same property that was sold. Therefore, miscellaneous expenditures for drawing plans, knocking out partitions, etc., were immaterial and the district court correctly excluded such evidence.⁹

As has been pointed out above, the district court let them prove the only thing that was really material, i.e., the total cost of the renovation. This case is similar to the *Hickey* case, *supra*, in that the cost in that case of making the building habitable for an alleged different highest and best use was also considerable. The court held in the *Hickey* case that the Government was entitled to show such costs, as against the former landowner, who was claiming the changed highest and best use. But the Third Circuit was careful to reiterate its holding in the *Kinter* case that the mere showing of past costs of repairs and improvements is not admissible. It is submitted that, when appellants were allowed to show the entire cost of the renovation, there was no prejudice because they were not also allowed to show how much had been expended on the portion of the renovation prior to condemnation.

III

Denial of appellants' motion for a new trial on the grounds of newly discovered evidence was not an abuse of discretion

This point is concerned solely with the motion for a new trial on the grounds of newly discovered evidence filed on August

⁹ Appellants acknowledge that the district court offered to let them prove, over objections of the Government, all expenditures they had made on this property, and appellants declined to do so (J.A. 487-490; Tr. 916-920). Therefore, the appellants are, in final analysis, left only with the argument that the district court's timing was in error, in that the ruling did not come at the most propitious time for them because it occurred on the last day of trial, rather than at the beginning. That a trial judge must make all his rulings concerning admission of evidence prior to or early in the trial is a novel idea, to say the least.

25, 1964. The newly discovered evidence is that the Government hired two appraisers, William F. Harps and Arthur M. Fisher, whose appraisals were substantially higher than the two appraisers, Throckmorton and Savage, who testified at the trial. Appellants admit that they knew prior to the trial that both Harps and Fisher had made appraisals for the Government. Therefore, judging from the affidavits which were attached to the motion the only newly discovered evidence was that on July 7 and August 7, 1964, Mr. and Mrs. Lawrence called upon Messrs. Harps and Fisher, who indicated inferentially that their appraisals had been at something in excess of \$2,000,000 (J.A. 610-614).

Whether to grant or deny a motion for a new trial on the grounds of newly discovered evidence under Rule 60(b), F.R. Civ. P, is a matter addressed to the discretion of the trial court with which this Court will not interfere except upon a showing of abuse. *Wolfsohn v. Hankin*, 116 U.S. App. D.C. 127, 128, 321 F. 2d 393, 394 (C.A.D.C. 1963), rev'd on other grounds, 376 U.S. 203; *Hughes v. Holland*, 116 U.S. App. D.C. 59, 60, 320 F. 2d 781, 782 (C.A.D.C. 1963); *Kolstad v. United States*, 262 F. 2d 839, 843 (C.A. 9, 1959). Neither in this Court nor in the district court did the appellants even offer to prove that the opinions or the appraisals of Messrs. Harps and Fisher would be admissible in evidence. The Government is not aware for what purpose such evidence would be admissible in the trial of the condemnation case to impeach the testimony of other experts.

Certainly appellants would not contend that the Government had to present all the expert witnesses they hired, even though they made an appraisal on an erroneous basis. Indeed, appellants themselves had another expert witness, Mr. Fred Babcock, whom they hired but did not call as a witness. The Government would further assert that, even if these appraisals were not on an erroneous basis, it was not obliged to present them. The government attorneys have the obligation to prove their case and have complete discretion as to which experts they call as witnesses. At the same time, they likewise have an obligation not to present lengthy repetitive testimony nor

to produce simply a parade of experts.¹⁰ And when his experts materially differ, the government attorney has the obligation, or at least the right, to present only the evidence of those he thinks to be correct.

A particular expert might be rejected on many bases: that he was not the most effective witness on the stand, that he was not available at the time of trial, that he was more expensive than another, that his appraisal was too high, etc. The mere fact that the Government hires an appraiser does not mean that it must accept the appraisal as correct. The Government only vouches for those witnesses which it calls. Therefore, if called, these witnesses would in no sense impeach the Government's case. They could only have been called as appellants' own witnesses to prove appellants' case.

Therefore, appellants have shown no abuse of discretion, and their motion is precluded by the rule stated by this court in *Philippine National Bank v. Kennedy*, 111 U.S. App. D.C. 199, 200, 295 F.2d 544, 545 (C.A.D.C. 1961):

We reach this conclusion because we think that in an independent action seeking relief from a judgment on the basis of newly discovered evidence and asking for a new trial the plaintiff must meet the same substantive requirements as govern a motion for like relief under Rule 60(b): he must show that the evidence was not and could not by due diligence have been discovered in time to produce it at trial; that it would not be merely cumulative; and that it would probably lead to a judgment in his favor.

We submit that appellants have met none of these requirements. The Lawrences obtained the "newly discovered" information merely by walking in and talking with Mr. Harps and Mr. Fisher. They knew in advance of the trial that these gentlemen had made appraisals for the Government. There was nothing to preclude them from interviewing Mr. Harps and Mr. Fisher at that time. Even if the evidence were introduced, it would be merely cumulative, as appellants already had two

¹⁰ The district court by pre-trial order frequently limits the number of witnesses.

expert appraisers testify on their behalf. There is nothing to show that two more appraisers would make any difference. Moreover, we seriously doubt that appellants would agree to produce the so-called newly discovered evidence at a retrial and then vouch for the appraisals of Messrs. Harps and Fisher.

CONCLUSION

The judgment of the district court and its order denying the motion for new trial on the ground of newly discovered evidence are correct and should be affirmed.

Respectfully submitted,

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FEBRUARY 1965.

APPENDIX

[J.A. 594] Now, the jury is instructed that if any property is peculiarly adapted by its construction, improvements or intrinsic character to some particular use or uses which gives it a higher market value than it would otherwise have, the circumstance or circumstances which make up such peculiar adaptability for such particular use or uses shall be considered, and the amount awarded as compensation for the property should be based upon its fair market value on January 18, 1963 in view of the most valuable use or uses for which it is shown the property is adaptable.

Now, by the most valuable use or uses to which the property can or may be put is meant either some existing use or one which the evidence shows is so reasonably likely in the near future that the availability of the property for that use would affect its present market value and would be taken into account by a purchaser under fair market conditions.

Now the jury is further instructed that compensation to the owner is to be estimated by reference to the use for which the property is suitable, having regard to the wants of the community, or such as may be reasonably expected in the immediate future. The special value of the land due to its adaptability for use in a particular business is an element which the owner of the land is entitled to have considered by the jury in determining the amount to be paid in just compensation. However, mere physical adaptability of the property for a particular use is not sufficient without a showing by a preponderance of the evidence of a market demand for the property for the particular use for which the property owner contends the property has as of the date of the taking.

* * * * *

[J.A. 595-596] In determining the value of the land, meaning buildings thereon, also, you are not to consider or be influenced by the fact that these proceedings, that is, proceedings

here in Court, are pending for the taking of the property. *You must consider all elements for the highest and best use of the property, including the lease to the United States, the lease which has been referred to in the evidence between the General Services Administration and the property owners in question, as well as to the sale and the leaseback, the sale being to the Woodmen of the World and the leaseback to the property owners, and all other elements as might influence a reasonably prudent person interested in purchasing the property.*¹

Putting it another way, gentlemen of the jury, you are to consider that you are outside of this courtroom and these proceedings are not being held, and you are to evaluate the property on what the willing purchaser, considering the elements that have been referred to, would pay on the open market for the fair market value of the property in question.

Now, the availability of the property for use gives it a market value, and the compensation therefor to the owners is to be estimated by reference to the use to which the property is being put or for which the property is available; hence, you will determine the reasonable or the reasonably highest and best use for which the property was available on the market as of January 18, 1963.

In considering the available uses to which the property at 920 E Street, Northwest, might be adapted or devoted for the highest and best use, the question is what an ordinary prudent businessman would do, and not necessarily what the landowners, that is the owners of the property, claim or indicate that they would do. While consideration may be given to the highest and best use to which the property could be devoted or was adaptable on January 18, 1963, the fair market value is to be determined for the property as it was on that date, taking into consideration the highest and best use.

[J.A. 600-602] Now, gentlemen of the jury, the Court has not commented on the evidence in this case because that is your field. The Court, having heard the testimony, has tried to outline to you certain guidelines that should control.

¹ Italicized portion is the instruction about which appellants complain.

As the Court understands the testimony in this case, the Government contends that on January 18, 1963, which is the date of taking of the property in question, that that property was appraised by two appraisers, and it was appraised as far as those two appraisers were concerned, Mr. Throckmorton and Mr. Savage, for a printing plant in the rear. You remember the testimony, and for a discount house in the front and for other purposes, and that as of the date in question that the fair and reasonable value of the particular property was "X" dollars, which you have heard the testimony and the Court will not try to recall whether it was a million-one or a million-four or what the testimony was. But that their appraisal of the highest and best use was for those purposes. There was a great deal of testimony submitted to you.

The Court further understands that the Government contends that it is not suitable for an office space or office building even though the Government did rent the premises in question. But if an office building were built on the premises that it would not be a financial and successful operation, because there is no market for the office building at that particular locality at this time.

Now, this was testified to by the experts in the case predicated on comparables, comparable sales in the locality, on, as the Court recalls, reproduction costs as well as on rebuttal on income.

Now, so far as the Court is concerned, it is not commenting on the evidence. The propertyowner, on the other hand, contends, as the Court understands it, that he bought the property in March of 1962, and they paid a certain amount for it; that as of January 18, 1963, that property was not the same property that he had purchased. It was not the same property because he had entered into a lease with the Government, and that the highest and best use for that property was shown by the lease which the Government entered into and that that lease was entered into sometime in August, as the Court recalls, in 1962, and it was sold. That is, plans were drawn, approved, and architects were employed.

You heard Mr. Venneri testify as to what part he played in that—costs of the building; you heard what Mr. Venneri said

about costs of the building. Those are the factors you must consider. But the contentions that the property owners say to you that it is not the same property that they purchased, as the Court understands it, and that an office building was the highest and best use, and the office building, when built, would be leased to the Government for a five-year period. But even if it were not leased more than the five-year period, because, in the lease there are options, if it were not leased for more than a five-year period, it would still be an income-producing property and warranting the expenditure of the one million three, one million-eight or one million seven, whichever you decided was to be the amount spent for the building of the building, that it would still be reasonable and practical and would what a reasonably prudent man would do.

Now, as I say, that is the contention of the propertyowners and that he sold this lease to the Woodmen of the World and he took the lease back on a lease. Those matters are in evidence. They can be minutely inspected by you if you should so determine. But these are the respective contentions, and they are wide apart. They are supported on both sides by evidence, and it is your obligation and your duty, and it is not an easy obligation and it is not an easy duty for you to perform, that you must take into consideration the testimony and the conflict in the testimony and weigh it carefully and from that testimony you must resolve the differences and you must arrive at what you consider to be just compensation to be awarded by the Government to the propertyowners in question, and I know, gentlemen of the jury, that you will give that matter just consideration.

In the United States District Court
FOR THE DISTRICT OF COLUMBIA
DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION, PLAINTIFF
v.

ALL OF LOT 803 CONTAINING 1831.57 Sq. Ft., ETC., ET AL.

TRUSTEES OF KESER ISRAEL CONGREGATION OF GEORGETOWN,
D.C., ET AL. AND UNKNOWN OWNERS, DEFENDANTS

District Court No. 1-62

(Condemnation for the acquisition of land for municipal purposes in Square 4, vicinity of Twenty-Sixth and L Streets, N.W., in the District of Columbia.)

Filed Sept. 25, 1962. Harry M. Hull, Clerk.

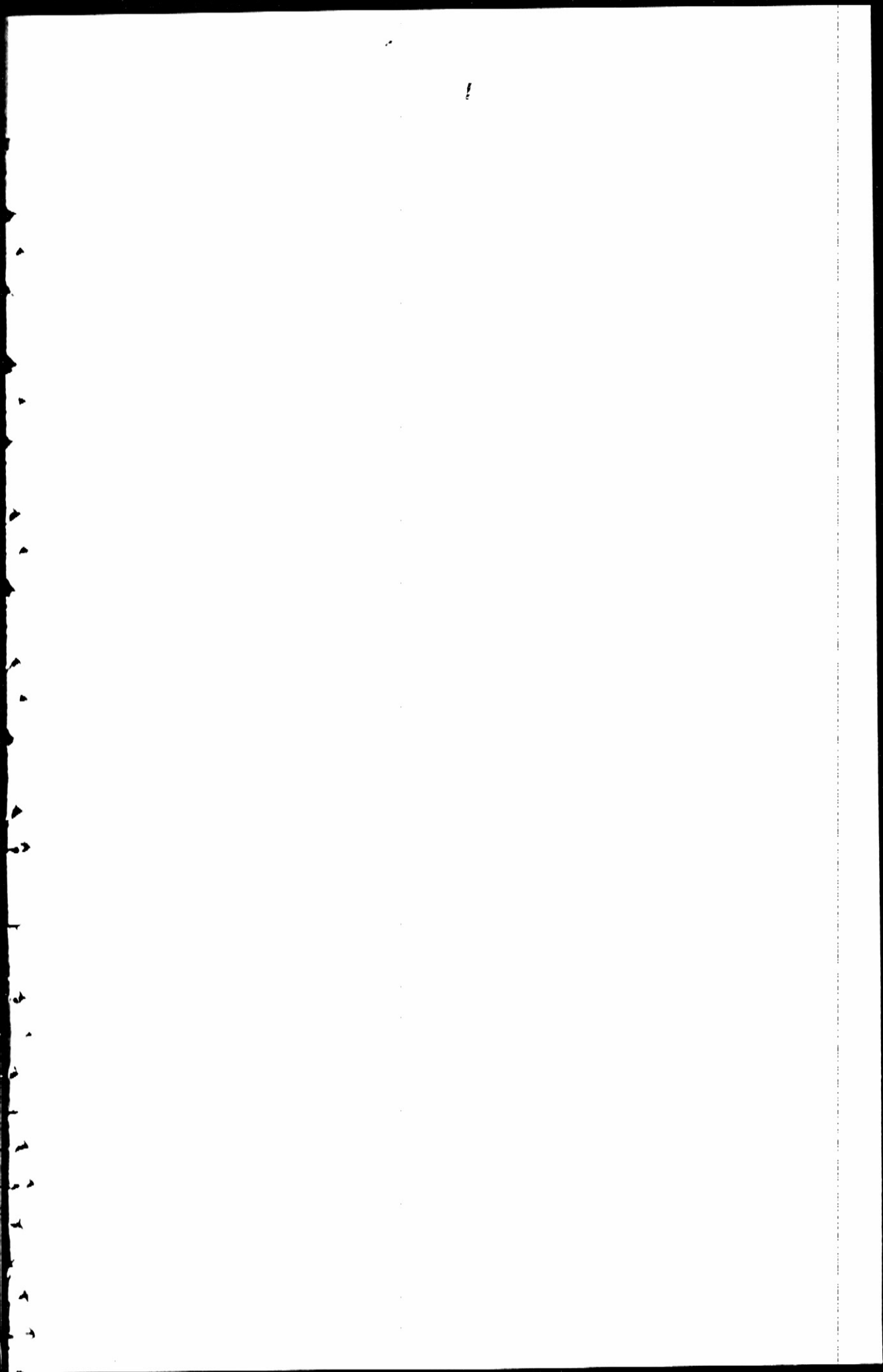
ORDER

Upon consideration of the motion of the defendants, Christian Heurich, Jr., et al., under Rule 37, Federal Rules of Civil Procedure, to compel witnesses Curt C. Mack and John E. Gogarty, real estate appraisers, to produce appraisal reports and to answer questions propounded upon oral examination in reference to their appraisals, and the opposition to said motion filed herein by the District of Columbia and the United States as *amicus curiae*, and the oral argument of counsel for plaintiff and defendants and for the United States, and its appearing to the satisfaction of the Court that the defendants have not shown good cause for the production of the documents described in the subpoenas duces tecum that the production of the documents and papers described in the subpoenas would violate the general rule that the work product of the lawyer is not subject to discovery, and that the overwhelming weight of

authority precludes discovery of the opinions, mental processes, weight given to various factors of valuation and appraisal figures of plaintiff's expert appraisers, it is by the Court this 25th day of September, 1962,

ORDERED: That the defendants' motion to compel the plaintiff's witnesses to produce records and to answer questions propounded upon oral examination be, and the same is hereby denied.

/s/ JOHN J. SIRICA,
United States District Judge.



REPLY BRIEF OF APPELLANTS

IN THE
**United States Court of Appeals
for the District of Columbia**

No. 18918
and
No. 19036

ALBERT P. DICKER, DAVID LAWRENCE, et al.,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

**Appeal from the United States District Court
for the District of Columbia**

United States Court of Appeals

for the District of Columbia

FILED MAR 10 1965

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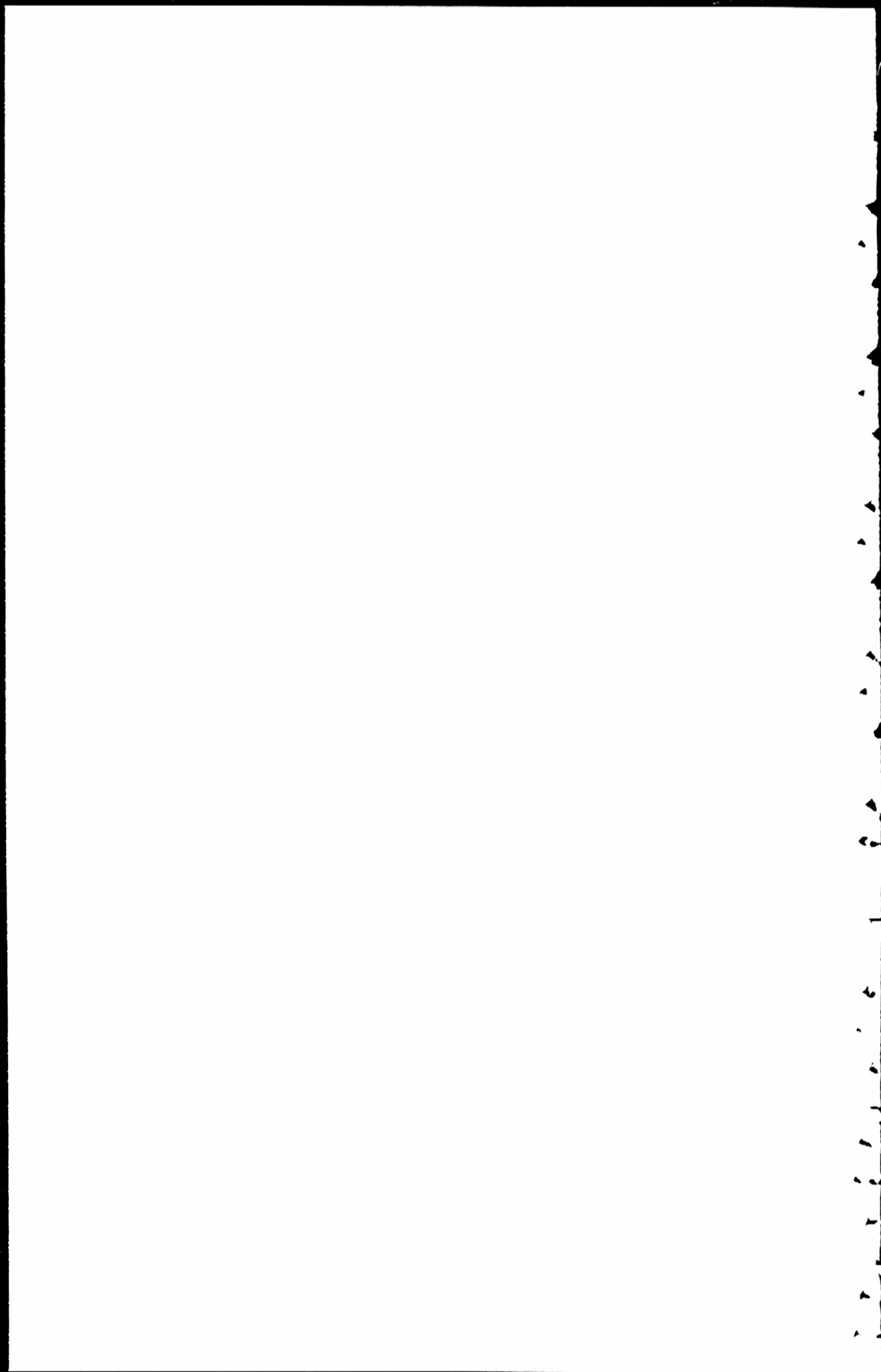


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REPLY BRIEF OF APPELLANTS

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ALBERT P. DICKER, DAVID LAWRENCE, et al.,
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v.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court
for the District of Columbia

The brief of the Government acutely demonstrates its inability to fashion an acceptable or convincing answer to the contentions of Appellants upon this appeal.

I.

The Court Order Prohibiting Discovery of Appraisal Reports.

The Government argues that in a condemnation case the appraisal of a real estate expert is not a proper subject of discovery because it involves merely opinion evidence. (Gov't. Brief pps. 14, 15, 18-21). If this reactionary notion were accepted, the opinions of medical experts of plaintiffs and defendants as to the extent of the injuries of a plaintiff in a civil tort action and the cause of those injuries, as well as the opinions of all other technical experts, would not be discoverable. Yet state and federal courts throughout the

country recognize that such expert opinion evidence is discoverable. In a Fifth Amendment taking case, where the Government is under an implied contract to pay the owner the full fair value of his property taken for public use, there is more, not less, logic and reason for the discoverability of the valuation reports of real estate experts.¹

The claim of the Government that refusal to allow discovery is precluded by the "work product of counsel" rule (Gov't. Brief p. 22) would require this Court to conclude that a valuation of a real estate expert, which is represented to the triers of the fact as his own unbiased independent work product, is in fact nothing more than the private papers of partisan counsel. There is nothing in *Hickman v. Taylor* 329 U.S. 495 (1947) to sustain such an artificial scholastic inference and legal scholars have widely rejected it. 2A Barron and Holtzoff Sec. 798 p. 42; 4 Moore, paragraph 26.24 Friedenthal, *Discovery and Use of an Adverse Party's Expert Information* (1962) 14 Stanford L. Rev. 455, 488; Louisell, *Modern California Discovery* (1963) pps. 315, 316.

The Government suggests various alleged practical reasons why it is undesirable or unwise for the valuation reports of experts to be discoverable in condemnation cases (Gov't. Brief pps. 19-23). These are the same hackneyed reasons advanced by the opponents of the federal discovery rules. They were rejected by the Supreme Court in *Hickman v. Taylor*.

¹ The Supreme Court did not accept a June, 1946, recommendation of its Federal Advisory Committee that Rule 30(b) be amended to provide that the Court shall not order the production or inspection of "the conclusions of an expert." (Our main Brief p. 23). Since 1946 neither the Advisory Committee on Federal Civil Rules nor the Standing Committee on Federal Civil Rules nor the Judicial Conference of the United States has recommended that there be made this or any comparable change in the federal discovery rules.

In desperation the Government "suggests" "the question" whether Rule 71A, Condemnation of Property, of the Federal Civil Rules was intended to incorporate the Federal Discovery Rules in an eminent domain case. (Gov't. Brief p. 23). Rule 71A at its very outset states:

"(a) APPLICABILITY OF OTHER RULES. The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule."

Thus Rule 71A(a) declares in explicit terms that the Rules of Civil Procedure govern the procedure for condemnation cases except as otherwise provided in the Rule. There is no provision in the Rule declaring or even intimating that the Discovery Rules do not apply in such a case.

This novel contention of the Government must be rejected because (1) of the plain language of Rule 71A, (2) it belies the interpretation of 71A by authoritative commentators, Barron & Holtzoff, *Federal Practice and Procedure*, (ed. 1961) Vol. 3, Sec. 1516 p. 549; 7 *Moore's Federal Practice* (2d ed. 1963) Sec. 71A.04 p. 2718, and (3) it is not sustained by any federal court opinion.

The Government claims that, assuming the pre-trial order was erroneous, it was within the neat legal concept "discretion of the trial judge." (Gov't. Brief p. 19). This notion means no more than that some things are best left to the judgment of the trial judge. But the concept was never designed to permit the liberality of discovery to be subverted under the guise of discretion or deny to an appellate court its responsibility to determine an important question of federal procedure under the discovery rules. Accordingly this refuge for arbitrary trial court action does not apply here.

The contention made in this case on behalf of the Government and the conflict of District Court decisions emphasize that there is an urgent need for the Court of Appeals for the District of Columbia, if not the Supreme Court of the United States, to authoritatively determine the important question whether appraisal reports of real estate experts in an eminent domain case are subject to discovery. This significant issue may be involved in any federal condemnation case and the District Court decisions are in such conflict that the law is in a chaotic state. The pre-trial order of the District Court in this case and the other District Court decisions against discovery of appraisal reports, emphasize the extent to which the federal discovery rules have been so restrictively interpreted as to (1) violate the considered mandatory declaration of the Supreme Court in *Hickman v. Taylor*, p. 507, that the discovery rules shall be given a broad and liberal treatment and (2) cause the construction of the federal discovery rules to lag far behind the more liberal treatment accorded state rules in a number of states.²

The Government asserts that, assuming the ruling of the District Court was erroneous, Appellants have shown no prejudice justifying reversal of the judgment. (Gov't. Brief p. 18). The pre-trial order prohibiting an exchange of appraisal reports and any discovery pertaining to expert witnesses was more far reaching than even the denial of a motion for discovery because the order not only unqualifiedly prohibited a voluntary exchange of valuations, not

² *Reynolds v. Circuit Court for Waukesha County*, 15 Wis. 2d 311 112 N.W. 2d 686, 113 N.W. 2d 537 (1961); *Crist v. Iowa State Highway Commission*, 123 N.W. 2d 424 (1963); noted 50 Iowa L. Rev. 218 (1964); *State ex rel. Willey v. Whitman*, 91 Ariz. 120 370 P.2d 273 (1962); all holding that in condemnation cases valuation reports of experts are subject to pretrial discovery. As to Maryland and California see note 7, our main brief p. 27.

only barred any form of discovery, but it precluded counsel from filing a motion under any of the discovery rules or from seeking discovery relief in any form. The order may reasonably be interpreted as even precluding counsel for the property owners from communicating with the real estate agents of the Government. Yet the United States Court of Military Appeals has recently held that it was a violation of due process for a commanding officer to direct a serviceman, charged with an offense, not to communicate with certain witnesses on the ground that a denial of access to any witness until the trial of the charge made his entitlement to compulsory process for the production of witnesses and other evidence "an empty and high sounding phrase." *United States v. Aycock*, December 4, 1964, 33 LW 1094, 2313.

Finally, as we have shown in our main brief, this prohibitory order obtained by the Government enabled the United States effectively to suppress any access by counsel for the property owners to the four valuations made by Harps and Fisher for the Government which were totally at variance with those submitted by the Government to the jury. This was more than prejudice; this was a violation of due process.³

³ The Gov't. brief p. 18 claims that the pre-trial order did not apply to appraisers whom the Government did not expect to call as witnesses and accordingly the prohibitory order did not preclude counsel for the property owners from discovering the appraisals of Harps and Fisher. We do not believe that the order should be given this technical restrictive interpretation. Nor do we believe that the District Judge in issuing the order had any idea of making a fine distinction between first choice experts employed by counsel for the Government to testify in the case, which Government counsel later concluded should not be used, and second choice experts which Government counsel decided to use at the trial.

II.

The Government Lease and the Commitment of the Life Insurance Society.

Throughout its brief the Government refers to the GSA lease of the buildings as the "tentative" lease, the "proposed" lease or the "prospective" lease (Gov't. Brief pps. 7, 10, 13, 14, 18, 22, 35, 36, 38 and 42). The Court will find that there was nothing tentative, proposed or prospective about this lease. The lease was as definitive, binding and noncancelable as any lease could be, whether executed by the Government or by a private person.

Its terms were freely negotiated by the owners and the General Services Administration. There was no evidence of coercion or compulsion on the part of GSA. The Government had been offered 63 sites (App. 326), i.e., over 6 million square feet of space (App. 329) within an 8 mile radius from the Ellipse south of the White House (App. 328) pursuant to GSA's Invitation for Bids for office space, and the Government had procured and leased 626,000 square feet of space (App. 355). Thereafter GSA concluded that it wished an additional 700,000 square feet of space, including about 400,000 square feet in downtown Washington (App. 358). The Government issued letters of solicitation to various persons, including Appellants, asking for negotiated proposals and ascertained there was potentially available in excess of 600,000 square feet in the City (App. 358, 359). Since the property owners in this case had made an offer to the Government of their remodeled buildings pursuant to the Invitation for Bids and GSA had become familiar with the premises, there ensued negotiations with the property owners for the lease. Rankin, a GSA official, testified that one of the primary reasons the Government selected these buildings as against other buildings potentially available

was because they could be delivered within the time allotted (App. 330).

If the Government had selected a different site for its lease, the buildings would have had to be constructed or remodeled because most of the buildings tendered to the Government were not then in existence (App. 330). Upon execution of the GSA lease the owners were required to give and did give a bond to the Government in the penal sum of \$389,000 conditioned upon the renovation of the buildings in conformity with the lease plans within the allotted time (App. 335), and in addition the lease required the owners to pay the Government as liquidated damages \$1,000 per calendar day of delay (App. 335, 336, 338).

Before executing the lease, GSA personnel inspected the premises (App. 333), reports were made with respect to it (App. 333), the conversion plans of the owners were reviewed (App. 332, 333), an appraisal of the property was made of the value of the renovated buildings to insure that there would be no violation of the Economy Act which limited the amount of rental the Government could pay (App. 333, 334, 369), and the Government satisfied itself that there would be no violation of the Economy Act (App. 333, 334, 369). At the time the lease was executed on August 8, 1962, GSA officials had no idea that another Department of the Government might later condemn the property (App. 338, 339).

There was no evidence in this case that the rental of \$389,000 a year provided for in the lease might be excessive, and on the contrary real estate experts Kolb and Mack testified without contradiction that it was fair and reasonable (App. 188, 412, 425). Hendrickson, an official of the Woodmen of the World Life Insurance Society, expressed

the opinion that, if the lease were not renewed by the Government, a much higher rent would be obtained from private lessees. (App. 323).

No official of GSA indicated that the rental was excessive. Rankin, an official of GSA who participated in the negotiation of the terms of the lease, testified that administrative regulations did not allow GSA to pay rental in excess of that paid by other people for similar space without justification and GSA's general guideline was to pay as rental about 9%, after deduction of expenses and fixed charges (App. 364). There was no evidence that any official of GSA considered that the rental might violate this administrative limitation.

All of the negotiations with the several bidders, including Appellants, were conducted within the conditions and terms of the original Invitation for Bids (App. 369). When counsel for the owners asked Mr. Rankin whether the negotiations were not free, open and objective, counsel for the Government objected and the Court ruled that "the objection is sustained on the basis that the Government has not objected to the lease" (App. 370).

As to the claim of the Government that the District Court properly ruled that the lease should not be deemed evidence of value of the property because the lease was contingent upon the remodeling of the buildings, suffice it to say that there was no evidence in this case that the owners were unable financially or otherwise to effect the remodeling of the buildings within the allotted time. At the time of the taking when the Government stopped the alteration work (App. 370), the remodeling plans had been approved by the municipal authorities, the necessary permits for the work had been obtained, materials had been delivered to the job site and the contractor was proceeding with the work. There

was no evidence that the remodeling work would not or could not have been completed in accordance with the terms of the lease.

The test of admissibility of this lease as evidence of value and of its consideration by the jury as evidence of value is whether a willing buyer of the property would give consideration to the lease in determining whether he would purchase the property and in determining the price which he would pay for it. *Olson v. United States* 292 U.S. 246, 255, 257 (1934). No prudent buyer, of course, could conceivably consider a purchase without consideration of the Government lease because a buyer would succeed to the contract obligations of the owners to effect the remodeling of the buildings into office space and, if he failed to do so within the allotted time, he would forfeit to the Government the \$389,000 bond and be required to pay the Government \$1,000 a day as liquidated damages. No prudent buyer could fail to consider that upon completion of the conversion, he would be entitled to the benefits of the lease, namely, a rental of \$389,000 a year during the 5 year period of the lease and, in the event the Government exercised its option of renewing the lease, a rental of \$417,000 during the additional 5 year period. Accordingly under this established test, the reasoning of the District Court that the lease was admissible as evidence of best potential use but not evidence of fair value was plainly erroneous.

The contention of the Government that a definitive, non-cancelable lease was not evidence of value because the leased buildings were required to be remodeled into office space in accordance with agreed plans accords no recognition to the realities of the real estate and mortgage market. It is not even necessary for the Court to take judicial notice of the well known fact that it is commonplace for urban

real estate to be valued as of the future construction of a proposed building in accordance with definitive plans and for lending institutions to make mortgage commitments to finance the construction of the buildings in reliance upon those valuations. Indeed, witnesses for the Government testified that they frequently valued property upon the basis of the construction of a proposed building for mortgage and other purposes (App. 121, 512). But here heavy duty buildings were already in existence and they required only remodeling. Furthermore, in this case a national insurance society with investments of \$250,000,000 made a commitment with the owners to purchase the buildings from the owners upon the completion of their remodeling for the sum of \$2,800,000 or their appraised value whichever was the lesser, and to lease-back the buildings to the owners for 25 years at an annual rental payable by the owners to the life insurance society of 7.74% upon the purchase price paid by the society. Although this respected national life insurance society had made a substantial contractual commitment in reliance upon this firm Government lease, the District Judge refused to permit the jury to consider the lease as evidence of value.

It is respectfully submitted that, whenever a trial court prevents the triers of the facts from considering as an element of value any valid, freely negotiated sale, lease or enforceable commitment relative to private property taken for public use, the Court has preempted the functions of the jury and has denied the property owners due process.

The Government argues that the need of the Government for office space precluded the admissibility of the lease as evidence of value (Gov't. Brief p. 26). If this contention is valid, it would prevent the jury from considering as evidence of value any freely negotiated voluntary purchases, leases

or other acquisitions of property by the United States. It would mean that in the District of Columbia, where the Government is known to acquire property to a substantial extent, juries in condemnation cases would be denied access to a major element of the real estate market. If a court were required to divorce such transactions from the consideration of the jury, it would mean that the compensation paid owners of property in condemnation cases would be far less than the fair value provided for by the Fifth Amendment. This contention of the Government is a distortion of the opinions of the Supreme Court in *Cors* and *Carlstrom* (discussed in our main brief), where particular Government transactions in a national emergency of war required the Government to pay an excessive price and accordingly the transactions were not deemed to be admissible as evidence of fair value.

The contention of the Government in its brief at pps. 27, 28 that no Governmental transactions may be deemed admissible as evidence of value because the Sovereign has the power to condemn has been rejected by the Supreme Court and by this Court as shown in our main brief at pages 38, 39. The fact that the sovereign possesses the alternative power to condemn affords a more valid reason for considering its voluntary freely negotiated purchases, leases and other real estate transactions as elements of value than in the case of a party which does not have such a power. A party without a power of eminent domain can only acquire property by private negotiation, but, if the Sovereign is unable to obtain property by negotiation at a fair price, it may elect to condemn.

The contention of the Government on this appeal (its Brief pps. 25, 26) that the admission of the lease as evidence of highest and best use was equivalent to its admission in

evidence as evidence of value seems incredible. Throughout this long trial Government counsel maintained the emphatic position that, if the lease were admitted, it should only be admitted as evidence of best potential use but not as evidence of value. The District Judge so ruled in his pre-trial order, and maintained and reiterated the same position before the jury again and again and again. It is not enough for the Government to say that the District Judge permitted real estate expert Mack to put before the jury his valuation on the basis of a capitalization of the rental provided for in the Government lease less the cost of remodeling the building. Under the repeated rulings of the District Judge, the jury could not treat Mack's valuation as a reliable one and its award conclusively shows that it did not do so.

Consideration of the highest and best use which may be made of a property is appropriate only when property is used for one purpose but there is a reasonable prospect that it is potentially available for a more valuable one. Thus the owner of a farm near a developing city may be permitted to show that his land may have a potentially higher use for development purposes. If there had been no Government lease, it would have been appropriate for the property owners to offer evidence that their warehouse buildings might be remodeled into office buildings and this would be the highest and best use of them. The pre-trial and trial rulings of the District Judge, his denial of Defendant's requested instruction No. 4 and his charge to the jury were geared to this hypothetical and very different situation. Here, however, there was not merely the testimony of expert witnesses for the property owners that the highest and best use of these buildings was their conversion into office buildings, there was a firm, binding, valid Government lease at a fair rental upon the remodeling of the buildings into

office buildings in accordance with approved drawings, and there was no evidence in this case that their remodeling would not have been completed except for the preemption of the buildings by another branch of the Government. Accordingly the admission of the lease as evidence of best use only was not equivalent to its admission as evidence of value and the District Judge usurped the function of the triers of the fact in repeatedly ruling throughout the trial that the lease might not be considered as an element of value.

When the District Judge repeatedly ruled that the object of the case was to ascertain the fair market value of the property and that the lease might be considered in the jury's consideration of possible highest and best use but not as an element of fair value, the laymen jury were entitled to assume that the District Judge was telling them that office building use might be conceivably feasible but the terms of GSA's lease must be unfair or it was not binding on the parties. The jury was also entitled to assume that, if the District Judge had believed that the jury was entitled to consider the lease as an element of value, he would have said so.

III.

Expenditures of the Owners in Renovating the Buildings.

The Government contends that the property owners were not prejudiced by the ruling of the District Court that their expenditures in connection with the remodeling of the buildings were not admissible because they were not a proper element of fair market value. (Gov't. Brief p. 32). The Government's assertion that the jury is "not concerned with the owners' investment in property" (Gov't. Brief p. 32) is totally at variance with its position throughout the trial and in argument to the jury that the best evidence of

value in this case was what the owners had paid for the property.

The Government concedes "Of course, if the property has been improved in such a way as to enhance its fair market value, it is proper to show this. Or if the property has been changed sufficiently, it might bear on the question of whether the last prior sale is truly comparable, i.e., whether it is still the same property that was sold" (Gov't. Brief p. 33). The work undertaken by the owners to effect the remodeling of the buildings in accordance with their firm commitment with GSA could not fail to enhance the value of this property and accordingly is within the concession of the Government.

The principal claim of the Government seems to be that, since the District Court permitted the property owners and the Government to submit estimates of the total cost of the remodeling of the buildings for office use, there was no prejudice in the refusal to allow the owners to show their actual expenditures prior to condemnation (Gov't. Brief pps. 32, 33). The position of the United States throughout the trial and in argument to the jury was that this property should be valued as it was, namely, as vacant warehouse buildings; the Government lease was without real significance because it was entirely conjectural whether the buildings would be in fact converted to office use. Accordingly it became of major consequence to the owners to show their intention to perform and their ability to perform their commitment with GSA and the best possible evidence of this important fact was what they had actually done and the expenditures they had actually made. How could it be fair and just to permit the Government to challenge the good faith efforts of the owners to remodel the buildings for office use but deny them an opportunity to establish their good

faith expenditures? Accordingly there was a very definite and real prejudice to the property owners in the pre-trial ruling.

The cases cited by the Government do not sustain the erroneous pre-trial order of the District Court.

The Government contends that the District Court properly ruled that the commitment of this well-known and respected national life insurance society should not have been considered as an element of value because the sale and lease-back was a financing arrangement in the nature of a mortgage. (Gov't. Brief pps. 28, 29). Yet legally a sale of the property to the life insurance society as provided for in the commitment would have been in fact and in law a conveyance of title to the property and the lease-back would have been in fact and in law the transfer of a leasehold interest in the property to the owners. Although the argument made on behalf of the Government on this appeal is one which it was entitled to make to the triers of the fact, it did not justify the trial court in preempting the function of the jury and excluding this commitment from its consideration as an element of value as a matter of law.

The erroneous ruling emphasizes that the Supreme Court defined a sound public policy in *Olson*, above, when it insisted that a condemnation jury is entitled to consider *all* factors affecting property in its determination of just compensation. Hendrickson, an official of the life insurance society, testified without contradiction that a commitment such as that made by the insurance society, supported by its good faith deposit of \$14,000, would be accepted in the banking and mortgage market as a basis for financing (App. 309). Is it not inherently scholastic then for a Court to impute to itself such knowledge of a free negotiated significant business transaction as to provide a basis for it

to rule the transaction inadmissible as an element of value of the property when the experience of the insurance, mortgage and banking world is directly to the contrary?

CONCLUSIONS

In this case the property owners manifested courage, imagination and initiative in appreciating the possibility of converting the buildings into office buildings and in developing that possibility into a certainty. They tendered the buildings to the Government for this purpose in response to the Invitation for Bids of GSA. Thereafter they negotiated the terms of the lease with GSA, executed the lease and undertook the remodeling of the buildings. The owners also showed imagination and initiative in then proceeding to negotiate the commitment of a respected national life insurance society for a sale of the property to the insurance society (excluding the 13,000 square feet of vacant land) and its lease-back to the owners.

As a consequence of these transactions, the owners within a fairly short time were transforming vacant warehouse buildings, which had only been used for warehouse purposes, into office buildings under lease to GSA upon favorable terms with an additional commitment of the national life insurance society and still retaining the vacant parking lot for future development—all enhancing the value of the property to a very, very substantial extent.

The award of the jury did not reflect these transactions, including the GSA lease, the life insurance society commitment or the remodeling work in progress. On the contrary the award valued this property as it was upon its acquisition by the owners, vacant warehouse buildings. Yet no other award could have been made under the erroneous rulings of the District Judge who preempted the function of the

triers of the fact and denied to them their right to give consideration to these significant elements of value.

It is submitted that the judgment should be reversed.

Respectfully submitted,

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